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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 65

THE UNITED STATES, PETITIONER

vs.

CALLAHAN WALKER CONSTRUCTION COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 1, 1942

CERTIORARI GRANTED MAY 11, 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1094

THE UNITED STATES, PETITIONER

vs.

CALLAHAN WALKER CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

1 In the Court of Claims of the United States

No. 43102

CALLAHAN WALKER CONSTRUCTION COMPANY, *plaintiff*

v.

THE UNITED STATES OF AMERICA, *defendant*.

I. *Petition*

Filed August 6, 1935

Comes now the plaintiff, Callahan Walker Construction Company, a corporation, by its attorney, Robert A. Littleton, and respectfully shows to the Court:

1. The plaintiff is a corporation organized and existing by virtue of the laws of the State of Nebraska, with its principal office and place of business at Omaha, Nebraska.

2. That on the 27th day of August, 1931, the plaintiff entered into a contract with the defendant, the United States of
2 America, to construct about 3,881,600 cubic yards of earthwork, being levee construction on the Mississippi River and its tributaries under the Flood Control Act of Congress of May 15, 1928, as described in paragraph 39.2 of specifications referred to in said agreement of August 27, 1931, at the stipulated consideration of fourteen and forty-three hundredths cents (.1443¢) per cubic yard in accordance with the specifications, schedules and drawings made a part of said agreement and designated (1) Specifications, serial No. 32/30, attached to said agreement, and (2) maps, file No. 53/72 attached to said agreement. Said agreement provided that work under same was to commence by plaintiff within 20 calendar days after the date of the receipt of notice to proceed, and to be completed within 460 calendar days from date of receipt of notice to proceed.

3. That in accordance with the terms and provisions of said agreement of August 27, 1931, plaintiff duly and faithfully qualified itself to carry out its part of said agreement by making bond and acquiring by purchase the tools, machinery and equipment approved by agents, engineers and inspectors of the defendant, necessary to perform the work contracted for with dispatch and in accordance with specifications prescribed. That the tools, machinery and equipment necessary and required to do the work called for in said agreement of August 27, 1931, were of special construction and design, and the cost of same to plaintiff was in the aggregate sum of $221,000.00.

4. That after work was commenced, pursuant to the terms of said agreement of August 27, 1931, and in accordance with
3 the specifications made a part thereof and had been diligently prosecuted by plaintiff, a subsidence occurred in the Lake Lee set-back, Item A. In the specifications, and on or about October 18, 1932, by written authority and instructions from the duly qualified agent of the defendant, the specifications for the work contracted for were changed. That by reason of the change in said specifications, the character of the work originally contracted for was materially altered and the machinery acquired by the plaintiff for the performance of the construction work originally agreed upon became less adequate and to a degree obsolete for the performance of the work called for under the changed specifications for its performance.

5. That by reason of the changes in the original specifications, which changes were due to no fault or oversight on the part of the plaintiff, the cost to the plaintiff of fulfilling the terms of the contract of August 27, 1931, as changed, was materially increased by reason of the requirement under the changed specifications, that new, different and additional machinery, tools and equipment had to be acquired by plaintiff to perform the work under the changed specifications and the cost to the plaintiff of the operation of said new, additional and different kind of machinery, tools and equipment was materially increased over the cost of the operation of the machinery originally acquired and adequate to do the work specified in the original agreement of August 27, 1931. In addition to this increased cost to the plaintiff by reason of having to perform the work under the changed plans with additional equipment, the plaintiff's cost for the job was materially affected due to the reduction in work available to
4 the special equipment which was purchased to perform the work within the limits of the plans and specifications at the time the contract was entered into between the plaintiff and the defendant. Also the change in specifications called for additional work on the part of the plaintiff, not contemplated in the agreement of August 27, 1931, and such additional work is alone attributable to the changes in specifications made a part of said original agreement. That such additional work, under the changed specifications, developed from time to time as the work progressed and plaintiff was instructed by the authorized officers and inspectors of the defendant to perform such additional work, and that compensation would be paid therefor in proportion to the benefits received by the defendant and the additional cost to plaintiff incident to the performance thereof under the changed specifications. That the extra work required under written in-

structions from the officers of the defendant, and the additional cost to the plaintiff of performing the same is in the aggregate amount of $16,952.79, for which the defendant has received and retains the full benefit and enjoyment.

6. That when the original contract of August 27, 1931, as changed by additional specifications, was completed on the 4th day of December, 1932, plaintiff filed with the defendant its claim for compensation, under the terms of said contract, for the cost to it of the extra and additional work required of plaintiff under the changed specifications, in the aggregate amount of $16,952.79; but payment therefor was refused by the defendant. That said extra and additional work was done in accordance with the specific terms of the instructions and specifications therefor furnished to the plaintiff by officials of the defendant. That the
5 defendant has received and now retains the full benefit and enjoyment of said aditional work required of plaintiff, and the cost of same to plaintiff in the amount of $16,952.79 is a just claim against the defendant and ought to be paid to plaintiff.

7. That plaintiff has exhausted all remedies open to it before the governmental departments of the defendant for the recovery of said amount now due and owing to it under the terms of said agreement of August 27, 1931, and as a last resort brings this suit against the United States for the recovery of said amount of $16,952.79 with legal interest, by judgment of this Court.

8. That said claim, or any part of same has not been assigned, plaintiff is the true, legal and sole owner of said claim, that it is just, due and owing to plaintiff and is not entitled to any offsets or counter claims; that no action for the payment of said claim has been taken before the Congress or any department of the government, except as above stated.

WHEREFORE, plaintiff sues the United States of America for said sum of $16,952.79, together with interest thereon at legal rate of interest until paid, and prays judgment of this Honorable Court in its favor.

ROBERT A. LITTLETON,
Attorney for Plaintiff.

6 [*Duly sworn to by Mark C. Walker; jurat omitted in printing.*]

7 II. *General traverse*

Filed September 14, 1935

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies

each and every allegation therein contained; and asks judgment that the petition be dismissed.

ANGUS D. McLEAN,
Assistant Attorney General.

H. A. B.

III. *Argument and submission of case*

On October 9, 1941, the case was argued and submitted on merits by Mr. Robert A. Littleton for plaintiff and by Mr. W. A. Stern, II, for defendant.

IV.

SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW, OPINION OF THE COURT BY GREEN, J., CONCURRING OPINION BY WHITAKER, J., DISSENTING OPINION BY MADDEN, J. FILED JANUARY 5, 1942.

Mr. Robert A. Littleton for the plaintiff. Mason, Spalding & McAtee were on the briefs.

Mr. William A. Stern, II, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

1. The plaintiff and defendant entered into a written contract dated August 27, 1931, whereby, for a consideration of 14.43 cents per cubic yard plaintiff agreed to furnish all labor and materials, and perform all work required for constructing "about 3,881,600 cubic yards of earthwork" as described in paragraph 39.2 of Specifications No. 32/30, attached to the contract and made part thereof. Map, file No. 53/72, was also attached to and made part of the contract. The work was to be commenced within 20 calendar days after the date of receipt of notice to proceed and be completed within 460 calendar days from that date. The officer contracting for the United States was T. B. Larkin, Major, Corps of Engineers, District Engineer.

Copy of the contract, with the specifications and map, is filed in evidence and made part hereof by reference.

The plaintiff received from the contracting officer notice, September 1, 1931, to proceed with the work, reading as follows:

"You are hereby notified to proceed with work under your contract symbol number W eleven naught six engineer fourteen ninety one dated August twenty seven nineteen thirty one. Stop. Contract papers being mailed. Stop. Acknowledge."

The plaintiff had previously, August 25, 1931, been notified by the contracting officer that its bid on Lake Lee Setback items A to D inclusive had been accepted.

This fixed the date for completion of the work December 4, 1932.

2. Plaintiff's work was described in the specifications under Article 39.2. Among other things the contract provided:

"(b) Borrow Pits: The material for the work shall be obtained from riverside borrow pits in accordance with paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from existing levee where so indicated on map.

"(d) False Berm: A false berm, 100 feet wide landside and 100 feet wide riverside, measured from the toes of the levee, shall be built between Station 5116+46 and Station 5119. False berm shall have level crown at grade of 118.0 ft. M. G. L. (Net) with side slopes of 1 on 2 from edges of crown to natural surface."

3. Immediately after the opening of bids plaintiff notified the contracting officer by letter dated August 19, 1931, as to its equipment, as follows:

"It is proposed to build this work with one new Bucyrus electric tower with a twelve-yard bucket, 130-foot headmast, 50-foot tail tower, and one 6150 Monaghan dragline with a 160-foot boom and a seven-cubic-yard bucket. We are promised delivery on the electric tower September 25th, and we figure we will be ready to start work by November 1st. The 6150 dragline has three months work to do in the Memphis District, making it available for this work December the first. In addition to this we will have two small one and one-half cubic yard draglines with 50-foot booms to do miscellaneous work."

4. The location of the work was alongside Lake Lee, which was a loop abandoned by the Mississippi River. The levee to be constructed was on the Mississippi State side of the
11 river, near Wayside, and was to be setback landward a short distance from an existing levee, the earth from which was in places to be used in constructing the new levee.

In usual Mississippi River levee construction earth is obtained from land between river and levee. Setting the new levee back to the landside of the old levee made more material available on the riverside of the new levee. So-called "rights-of-way" were procured by the Government from which to excavate material for the new levee, additional to that which might be utilized from the old levee.

The stretch of levee particularly here in controversy is from station 5113 to station 5123, a distance of 1,000 feet. That part of the old levee which was alongside this particular stretch of

new levee was available in its entirety for the new work. This thousand-foot section was part of Sub-project Item 495L–A, sometimes referred to as "Item A," extending from station 5081+28 to station 5146, the cubic yardage of which was estimated in the specifications as New Levee 954,250 cubic yards, average height 27 feet, and Berm 22,750 cubic yards, total 977,000 cubic yards. The specifications provided that a false, that is to say, an artificial berm 100 feet wide landside and 100 feet wide riverside, should be built between station 5116+46 and station 5119, with a level crown at grade of 118 feet mean gulf level (net) with side slopes of 1 on 2 from edges of crown to natural surface.

5. During the progress of the work difficulty was experienced in building the levee to the required height due to persistent subsidence. This situation was especially troublesome between stations 5123 and 5136.

As the levee subsided the surface in the riverside borrow pits correspondingly arose.

The plaintiff had begun work at the southern end, station 5336+54.5 and was working northward toward the north end, station 5081+28. Trouble with foundation failure had been first encountered at about station 5146, but the levee therefrom to station 5123, had been accepted for grade and section and from 5123 to 5113 had been about 68% completed when the contracting officer, being concerned over foundation failures and subsidences met with south of station 5123, ordered the plaintiff on
12 October 7, 1932, to stop work at or about station 5123, proceed to station 5113 and work northward therefrom, omitting work from 5113 to 5123 for the time being. His purpose in doing this was to give him time to investigate and determine upon measures that would forestall subsidence between stations 5113 and 5123.

6. The plaintiff complied with the contracting officer's order of October 7, 1932, and proceeded to station 5113.

The contracting officer considered the situation between stations 5113 and 5123 and on October 18, 1932, issued the following order to the plaintiff, against plaintiff's objections that no extra price was allowed and that it was not within the contract terms, and with oral notice to the contracting officer that plaintiff would later assert a claim for extra costs occasioned by the change in work:

"In reference to recent subsidence which occurred on your Lake Lee Setback, Item A, this will confirm instructions issued to you by the Central Area Engineer relative to the completion of your contract, as follows: (a) A riverside false berm will be constructed from station 5113 to station 5123 having a riverside crown elevation of 120 ft. M. G. L. at a distance of 250 feet from

the centerline and sloping upward toward the levee on a 1 on 18 slope and downward to the ground surface on a slope of 1 on 6.

"(b) The above berm shall be completed before doing any further work between stations 5113 and 5123.

"(c) You will be given credit for 100% of the embankment south of station 5123.

"(d) If and when directed by the contracting officer, the levee between stations 5123 and 5146 shall be sodded.

"(e) Payment for aditional yardage made necessary by the above instructions will be made at contract price per cubic yard."

The additional work so ordered by the contracting officer was necessary for the completion of the project.

Article 3 of the contract reads as follows:

"ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall
13 be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

Article 15 reads as follows:

"ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be finel and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed."

7. Plaintiff's bid was in part based upon the use of towers. One tower, called the "head tower," is placed on the levee site, and the other tower, called the "tail tower," is placed where the earth is to be obtained for the levee. A cable reaches from the tail to the head tower and the excavating shovel at the tail tower

scoops up the earth and travels on the cable to the head tower, where it is deposited at will. Each tower is placed where its operating radius is most effective.

The use of towers does away with the necessity of trucking or drifting all the earth in from borrow pit to embankment or rehandling the same by relays of excavating equipment.

Under the original plans plaintiff would have had to drift in some material to its tail tower, due to the lack of sufficient suitable material directly in front of the new levee.

The enlargement of the riverside false berm required under the order of October 18, 1932, necessitated plaintiff's hauling or drifting in additional material to bring it within reach
14 of the tail tower, over that required in the construction of the originally required work. Suitable material did not extend in depth to more than two or three feet in the borrow-pit area, and the territory possible of excavation for levee material, under the revised plan, was extended beyond the limits contemplated by the contract.

The landside berm, stations 5113 to 5123, was constructed by Government forces, the plaintiff being relieved of the work thereon required by the contract.

The plaintiff built the enlarged riverside berm, stations 5113 to 5123, under protest that no extra price was allowed and, in doing the work, demanded, and has ever since demanded, of the defendant extra costs entailed by the enlargement.

8. Plaintiff completed within the contract time all work required by the contracting officer.

On Item A plaintiff placed 878,617 cubic yards of levee embankment for which it was paid $126,784.43; 68,274 cubic yards of riverside false berm between stations 5113 and 5123, under the order of October 18, 1932, for which it was paid $9,851.94; and 18,945 cubic yards of false berm prior thereto for which it was paid $2,733.77, all at the rate of 14.43 cents per cubic yard, totals of $139,370.14 and 965,836 cubic yards.

The following table shows the cubic yardage of Items A, B, C, and D (1) as estimated in Article 39.2 of the specifications and (2) as actually laid down:

Item	Estimated (1)	Placed (2)
A Levee	964,200	878,617
A Berm	22,730	87,219
B Levee	937,300	841,045
B Blue Hole	28,800	28,754
C Levee	972,300	906,232
D Levee	965,800	962,209
Totals	3,891,030	3,704,096

Plaintiff was required to place and in fact placed 177,504 cubic yards less than estimated in the specifications, and has been paid for the cubic yardage of 3,704,096 the sum of $534,501.07 at the rate of 14.43 cents per cubic yard.

The last payment made to the plaintiff was $13,937.01, being percentages retained on Item A. The plaintiff endorsed the voucher for the amount: "Signed under protest as to additional payment due for extra work performed by us due to subsidence Item A."

9. The embankment to the south of station 5123, referred to in the contracting officer's order of October 18, 1932 (finding 6), had been completed by the plaintiff to the required grade, but had not been dressed or sodded between stations 5123 and 5139. After being brought to grade the embankment subsided causing cracks to be opened up therein. This subsidence occurred on or about the night of October 6–7, 1932. Fearful that rain would wash down the cracks and aggravate foundation trouble, the contracting officer's representative ordered the plaintiff on or about October 11, 1932, to dress this section, stations 5123 to 5139, which was a levelling-off process preliminary to sodding, and this dressing was done by the plaintiff in three days of 12 hours each, between October 11 and 14, 1932. Thereafter plaintiff was relieved of sodding this section, and it was not sodded by the plaintiff.

Plaintiff used a Northwest dragline and bulldozers in dressing the section.

10. Plaintiff does not include in its claim handling of material by its tower machine. In constructing the enlarged riverside false berm plaintiff caused other equipment to be used in drifting in material to the berm or placing it within reach of the tail tower, an operation much of which would not have been necessary had the riverside false berm been confined to its original dimensions, and required the use of additional machinery furnished by a subcontractor as shown in the next paragraph. This work done by the subcontractor was not contemplated or required under the original contract.

This drifting or hauling in of the material was done by a subcontractor or the plaintiff and amounted to 45,895 cubic yards. For this work the plaintiff paid to the subcontractor, at the contract rate of 14.43 cents per cubic yard, $6,622.65. The agreement between plaintiff and the subcontractor provided that in the event that plaintiff was unsuccessful in its claim against the United States for compensation over and above the rate of 14.43 cents per cubic yard for the material so hauled by the subcontractor, the subcontractor would receive no more

than 14.43 cents per cubic yard, but that if the claim was allowed the subcontractor would receive more than 14.43 cents per cubic yard.

16 The work of this subcontractor did not include the dressing and sodding of the enlarged false berm. The sodding and dressing was done directly by the plaintiff at a fair and reasonable cost to it of $1,453.30. This is the cost of dressing and sodding the entire berm as constructed and there is no proof as to the excess over the probable cost of the originally designed berm.

11. The Government constructed the landside berm at stations 5113 to 5123 with its own forces, calling upon the plaintiff to construct the enlarged riverside berm on the other side of the levee. Plaintiff could not top out the levee stations 5113 to 5123 until both these berms were built. The tower machine had been moved up north of station 5113 in accordance with the contracting officer's order of October 7, 1932, and after accomplishing its mission tracked back to station 5113 October 28, 1932, ready to top out the levee station 5113 to 5123. At that time plaintiff had not completed the enlarged riverside berm and the Government forces had not completed the landside berm.

The landside berm was completed before the riverside berm. Working with and auxiliary to the tower machine was a 3-W Monaghan dragline, and this was idle whenever the tower machine was idle.

There is no satisfactory proof that plaintiff suffered any damage through the Government's operations in constructing the landside berm stations 5113 to 5123.

12. On December 28, 1932, the plaintiff filed a claim with the contracting officer for $16,952.79. The items included therein relevant to the items here sued on, are summarized therein as follows, 10 percent being added to the total "for use of tools and general supervision."

Item A. Building riverside false berm. Oct. 15th to 29th, inclusive, between stations 5113 and 5123, with Caterpillar tractors, wagons, and two 1¾ cu. yd. line loading wagons:		
2,280 Cat wagon hours at $4.50 per hr	$10,305.00	
599 Dragline hours at $6.75 per hr	4,043.25	
	14,348.25	
Less 45,895 cu. yds. which was allowed on estimate at .1443 per cu. yd	6,622.65	
Balance due		$7,725.60
17 Item D. Rehandling earth with our 7½ cu. yd. 180' boom Monaghan dragline due to dirt being borrowed from pits by tractor units building riverside false berm:		
116 machine hours from Oct. 31st to Nov. 5th, inclusive		$4,390.45

Item E. Filling cracks and depressions in subsided levee with NW 1¾ cu. yd. dragline; also A. C. Bulldozer between stations 5123 and 5146, Oct. 11th to Oct. 14th, inclusive:		
Dragline, 36 hrs. at $6.75 per hour	$256.50	
Bulldozer, 36 hrs. at $4.50 per hour	162.00	
		418.50
Item F. Labor dressing riverside false berm:		
NW 1¾ cu. yd. dragline, 44 hrs. at $6.75	$297.00	
Labor and Bulldozer operation	645.55	
		942.55

This claim has not been paid in whole or in part.

There is no dispute between the parties as to the time required by the subcontractor for doing the work described in Item A and Item D of this bill and the evidence shows that the price stated as the value of the use of the equipment and the work done by it as shown in these two items was reasonable and fair. The Monaghan dragline used was of more than usual capacity.

The proof fails to show that Item E included work not contemplated by the original contract and Item F is excluded under the last sentence of Finding 10.

The evidence shows that ten percent of the value of the equipment used as shown in Items A and D was a reasonable and customary charge for the use of tools and supervision in connection with the work so done.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $13,989.92.

It is therefore ordered and adjudged that plaintiff recover of and from the United States thirteen thousand nine hundred eighty-nine dollars and ninety-two cents ($13,989.92).

Opinion

GREEN, Judge, delivered the opinion of the court:

It appears that the plaintiff entered into a written contract with the defendant for performing a certain amount of
18 earth work according to specifications attached, this work being in the construction of a levee.

After the work provided for in the contract had been nearly completed, the contracting officer of defendant issued an order for the construction of a riverside false berm as described in finding 6, and stated in the order that "payment for additional yardage made necessary would be made at the contract price per yard." This additional work ordered was not contemplated or required under the original contract, but the plaintiff was paid for the

work only in accordance with the yardage price stated therein. It now brings suit to recover the additional cost of this work over and above the contract price.

The order made by the contracting officer unquestionably changed the contract and increased the amount due under it. The work was necessary for the completion of the project and within the general scope thereof and the contract provided for changes being made but Article 3 (see finding 6) provided that "If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly." The contracting officer paid no attention to the provision quoted above but required the plaintiff to perform the work in accordance with his order, although the change made a large increase in the amount due under the contract.

This we think was clearly a breach of the contract. As against this conclusion it is argued that Article 3 provided that "no change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative."

It is said that this provision was not complied with, but the contracting officer who made the contract and the order for additional work was the "duly authorized representative" of the department and has so been treated in all of our decisions. As he ordered the change he must have approved it. It is also said that the plaintiff was not obliged to comply with the order if it was unauthorized but the order was authorized and the contract
19 required the contractor to immediately proceed with the work in accordance with the order. It is quite evident that the order of the contracting officer fixing the contract price as a rate of payment for this additional work was not an "adjustment" required by Article 3. An "adjustment" is a change to meet changed conditions. Here no change was made although the findings show clearly changed conditions which made the additional work more costly not merely in quantity but per yard. In view of this fact, it is clear that it was not an "equitable adjustment" for no allowance whatever was made to the plaintiff on account of the additional cost per yard. Moreover the reading of the order shows that the contracting officer was not making any attempt at adjustment or any pretense thereof. He simply held that the contract rate applied to the additional work done. Here we have a case where the contracting officer not only refused to make an equitable adjustment but no adjustment whatever was made and certainly not an equitable adjustment. This was a breach of

Article 3, and by reason of this breach, the defendant was not entitled to any benefit from the remaining provisions of this article. As the case stands, it is merely one in which the defendant's agent ordered additional earth moved above that required by the contract. The findings show that this earth was so located that the cost of moving it would be much increased over the yardage price stated in the original contract.

It is especially urged, however, in the dissenting opinion that Article 15 provided that all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to appeal by the contractor. It is argued that there was a dispute of fact involved in the order of the contracting officer and that when he stated that the plaintiff would be paid for the additional work at the contract rate, he was in effect saying that this was the reasonable value of the additional work ordered and that this was a question of fact which he had the power to decide.

We think it has been shown above that he was not deciding a question of fact and that his order cannot be so construed. He did, in effect, assert that the contract rate applied to the additional work ordered but this involved a question of law which he had no authority to decide. We have also held above that he not only did not make an equitable adjustment but made no adjustment whatever.

Where extra work is ordered by the proper officer which is necessary and it is accepted and used by the defendant we have held that there is an implied contract to pay the contractor the reasonable value thereof unless there is a provision in the contract directly forbidding payment under the circumstances of the case. The general provisions with reference to the naval contracts do not prevent the application of this rule, and it was held in United States v. Spearin, 248 U. S. 132, 139, that neither 3744 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See Kellogg Bridge Co. v. Hamilton, 110 U. S. 108. United States v. Spearin, supra.

It is difficult to find any case where the precise question involved in this case was discussed at length, although the controlling principles have been decided. It has been held heretofore in effect that the provision for equitable adjustment where a change was made in the contract which increased either the quantity or the expense of the work was a peremptory requirement and must be followed. The reason for this assumption is manifest, for if it were not an absolute requirement but left to

the opinion or judgment of the contracting officer, it would be no protection whatever to the plaintiff and would permit the taking of plaintiff's work without compensation.

As no adjustment was made of the additional cost, the plaintiff under all of the authorities was not obliged to take an appeal or even to protest and without an appeal could bring suit to recover on an implied contract the reasonable value of the work. The plaintiff, however, did protest against the decision of the contracting officer that payment would be made under the contract rate.

It should be observed in this connection that even if the contracting officer was intending to make an equitable adjustment of the price per yard (we think it is clear that he did not) this was not a matter upon which he was authorized to make a final decision. The Supreme Court has held in two cases that the
21 question of what is an equitable adjustment is not one of fact but one of law. See Case v. Los Angeles Lumber Co., 308 U. S. 106, 114, 115, 119, and Securities Commission v. U. S. Realty Co., 310 U. S. 434, 452.

The question of whether an equitable adjustment was made would therefore in any event be one for this court to decide regardless of the form of the order of the contracting officer; and we have held above not only that the order was not an equitable adjustment but that there was no adjustment whatever.

Although cases exactly similar on the facts cannot be cited, the case of the United States v. Smith, 256 U. S. 11, 16, involves a similar question. In that case, the specifications provide that the decision of the engineer officer in charge as to quality and quantity of the work was final, and that his instructions were required to be observed by the contractor. The contract further required that modifications of the work in character and quality, whether of labor or material, were to be agreed to in writing and unless so agreed to or expressly required in writing no claim should be made therefor.

After part of the excavation had been made, it appeared that the material to be moved was of a very different quality from that stated in the specifications of the contract much more difficult and costly to be excavated. The plaintiff then claimed to be entitled to receive more for the work and an extra price for the reason that the quality of the excavation made it more difficult and costly than that specified in the specifications. His request for an extra price was refused and he was told if he did not proceed he would be regarded as in default. The evidence showed without controversy that the material was much more difficult to excavate than that described in the contract. A de-

fense was set up based upon the provisions of the contract set out above but the Supreme Court said that this defense overlooked the uselessness of soliciting or expecting any change to be made by the contracting officer and that the right of the plaintiff "to recover the price for the work done is indisputable." In the case cited, the contracting officer was authorized to decide whether the quality of the work was such as to require a higher price but it was said that the action of the contracting officer was contrary to the provisions of the contract with reference to the material to be excavated. In the case before us, the new
22 work to be done was also outside of the provisions of the contract and the refusal by the contracting officer to comply with the provisions of the contract with reference to its modifications rendered no appeal necessary.

The circumstances of the case before us are the same as in the Smith case, supra. The findings show that when the order was made, the plaintiff objected thereto on the ground that it was not within the contract terms and gave notice to the contracting officer that it would later assert a claim for extra costs occasioned by the change in the work, thus complying with the conditions of the contract. But as the contracting officer would not consider the plaintiff's claim or make any adjustment, it was not necessary that the plaintiff should take an appeal. The breach of the contract was complete when the contracting officer paid no attention to the objections and protests of the plaintiff against the order and refused to make any adjustment. Moreover the conduct of the contracting officer in refusing to consider plaintiff's repeated protests showed the uselessness "of expecting any change from him."

In the case of Rust Engineering Company, 86 C. Cls. 461, 476, 477, the contracting officer required the contractor to furnish a different and more expensive tile than was required by the contract and this court said that he thus obligated the defendant to pay the excess costs of the special tile, and that this action constituted a change in the contract which "required an equitable adjustment in the contract price by reason of the increased cost." Although the contract was exactly similar to the one in the case which we have before us and no appeal was taken from this order, the court held the defendant liable for the additional cost which plaintiff was required to pay for the tile demanded. The court said that this was not a dispute concerning a question of fact but one with reference to the construction of the contract, as the evidence showed without dispute that the tile was more expensive and presented the question as to whether under the provisions of the contract the plaintiff should be required to

furnish a more expensive tile than the one desired and known to the trade and the parties at the time the contract was made. The court also held that the decision not being one of fact but a construction of the contract, no appeal was necessary. In the case before us the plaintiff was required to to do work more costly in its operations than that required by the original contract. The two cases appear to be exactly parallel so far as the matters to which we have referred are concerned.

In the case of Callahan Construction Co. v. United States, 91 C. Cls., 538, 611, a somewhat similar contract case in which the plaintiff claimed to be entitled "to be paid for the extra expenses incurred by reason of being required to perform certain specified units of work in a manner different from and more expensive than that contemplated and specified in the contract and specifications," the court said:

"Where an instrument, especially one of such character as is involved in this suit, is drafted and prepared entirely by one party thereto, and is specific in its detailed requirements, subsequent doubts as to the meaning and applicability of the language and provisions thereof, to definite facts, conditions, situations, and circumstances should not be interpreted and construed in favor of the party who drafted and prepared it, but, on the contrary, in such cases the provisions of such instrument should, in case of doubt and in such circumstances, be interpreted more favorably to the other party who did not and could not, in the circumstances, have anything to say as to the language and provisions of the instrument as prepared."

We do not think any doubt arises in the case but if there be any, we think that in fairness, justice, and the manifest understanding of the parties the rule laid down above would be applicable.

No finding is made that the decision of the contracting officer that the additional work should be paid for at the contract price was arbitrary or capricious and this is presented as one of the reasons why his decision should be held final. We had no occasion to make such a finding. On the contrary, construing the language used by the officer in his order as a matter of law, we hold that he was not deciding a fact but merely issuing an order that the contract rates be applied to the extra work done probably in the belief that the contract authorized him so to do. This being merely his opinion, on the construction of the contract, could hardly be held to be arbitrary or capricious. It was rather a mistake in judgment, but in any event he had no authority to construe the contract.

For the reasons stated, our conclusions are:

1. That the defendant made no adjustment of plaintiff's claim and thereby breached the contract;

2. That the determination of what is an equitable adjustment is one of law and the contracting officer who could only pass on questions of fact had no authority to decide it;

3. That the plain meaning of the language used by the contracting officer in his order that "Payment for additional yardage * * * will be made at contract price per cubic yard" was that the contract price applied to the additional work, and that this was not in any sense a decision upon a fact but it was in effect a conclusion of law;

4. That the defendant having breached the contract by the refusal of the contracting officer to make any adjustment, the plaintiff could bring suit without taking any appeal, as the provisions for appeal applied only to the decisions of the contracting officer on questions of fact. Moreover there was no adjustment from which to take an appeal.

What we have said above shows that an implied contract arose to pay the plaintiff the reasonable value of the extra work so performed. The defendant, however, objects to this conclusion and says that the plaintiff has sustained no damage because it has only paid the subcontractor at the contract rate of 14.43 cents per cubic yard which has been paid to plaintiff by defendant and that "The agreement between plaintiff and the subcontractor provided that in the event that plaintiff was unsuccessful in its claim against the United States for compensation over and above the rate of 14.43 cents per cubic yard for the material so hauled by the subcontractor, the subcontractor would receive no more than 14.43 cents per cubic yard, but that if the claim was allowed the subcontractor would receive more than 14.43 cents per cubic yard" (see finding 10), that by reason of this agreement the plaintiff has sustained no damage and is not entitled to recover anything above the contract price for the extra work done.

We do not think that the agreement between plaintiff and its subcontractor is any defense. The defendant's liability was contractual. Its implied agreement was to pay the reasonable value of the extra work and if the subcontractor had agreed with plaintiff to do the work for nothing we do not think it would have invalidated this agreement. Certainly it would not have followed that the plaintiff could get nothing for this work from the defendant. The implied contract between defendant and plaintiff and the contract between plaintiff and the subcontractor are two entirely separate contracts, and in our opinion the latter had no effect or the obligations of the former.

At the time the change order was made, the plaintiff protested against it and notified the contracting officer it would ask for additional pay; and when it was paid at only the contract rate, it again protested and filed an itemized claim for additional work with the contracting officer amounting to $16,952.79 (see finding 12) for which it now asks judgment. We do not think the plaintiff is entitled to recover for Items E and F set out in finding 12 but hold that it is entitled to recover for Items A and D which are for the extra work required. The charges in this bill are not made up by the number of cubic yards moved but in accordance with the value of the use of equipment used by the subcontractor in completing the work and the defendant is given credit for the payment which it made on the yardage removed. There is no dispute between the parties as to the time required by the subcontractor for doing the work described in Items A and D and we find the value stated in the bill to have been reasonable and fair also that ten percent in addition for the use of tools and supervision was a reasonable and customary charge. The value of the subcontractor's work and equipment included in Item A was $14,348.25, under Item D $4,390.45, making a total of $18,738.70; 10% on this would amount to $1,873.87 and added to the value of the work makes a total of $20,612.57. From this should be deducted the $6,622.65 which defendant paid thereon, leaving a balance of $13,989.92 for which the plaintiff is entitled to judgment.

It is so ordered.

WHALEY, Chief Justice, concurs.

26 *Concurring opinion*

WHITAKER, Judge, concurring:

I concur in the foregoing decision for this reason, briefly expressed: The contract provided in article 3 that if changes were made bringing about an increase or decrease in the amount due under the contract "an equitable adjustment shall be made." Under the authority of Case v. Los Angeles Lumber Co., 308 U. S. 106, cited in the foregoing opinion, and other cases, what constitutes an equitable adjustment is clearly a question of law. (See pages 113, 114, 115, 118 and 119 of that opinion.) I think articles 3 and 15 gave no authority to the contracting officer nor to the head of the department to decide such questions.

Article 3 provides, "if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof." But article 15 confers on the contracting officer and the head of the department the right to decide disputes only as

to questions of fact. Hence, when a dispute arose under article 3 and the parties were unable to agree, it was necessary to take an appeal to the head of the department only on the questions of fact involved in the dispute.

There is no dispute between the parties in this case as to the facts. The only dispute concerns whether or not the amount allowed by the contracting officer for the extra work constituted an equitable adjustment, and this, as the majority opinion holds, is a question of law. Neither the contracting officer nor the head of the department was given any right by the contract to decide such questions. If, therefore, the plaintiff did not think the adjustment made by the contracting officer was equitable, it had a right to appeal to this court for relief. The relief granted by the court is the relief to which I think the plaintiff is entitled.

Dissenting opinion

MADDEN, Judge, dissenting:

I do not agree with the opinion of the majority.

The contracting officer here concluded, because the new levee in adjacent locations had subsided, that additional support should be given to the levee to be built by plaintiff. He thereupon advised plaintiff some days before October 18, 1932, that the false berm to be erected between the levee and the river was to be
27 enlarged beyond its dimensions as they were stated in the specifications. Plaintiff protested doing this work, saying that it was not necessary; that earth to form the additional berm was not within reach and that additional equipment would be required; that the price per yard of earth moved should be more than 14.43 cents per cubic yard provided in the contract. The contracting officer, however, on October 18, 1932, issued his order in writing that the additional work be done, and at the price per yard specified in the contract.

Here we have the situation contemplated in Article 3 of the contract (see finding 6). The contracting officer made a written change order and specified the price which plaintiff should receive for doing the additional work. The change had already been discussed orally and plaintiff had made clear its position that it considered the price too low. That protest was in the mind of the contracting officer when he set the price. Plaintiff made no claim for adjustment within ten days after the written change order was made, as Article 3 required, but that is probably immaterial, as the matter had been orally discussed before the written change order was issued, and the contracting officer was aware of plaintiff's position. Both plaintiff's claim for adjust-

ment and the contracting officer's adjustment therefore preceded the written order, but as indicated above, I think that is probably immaterial and I would not rest the decision upon the fact that plaintiff presented no further claim to the contracting officer within ten days after receiving the change order as provided in Article 3 of the contract.

Article 3 further provides that after these steps have been taken "if the parties cannot agree upon the adjustment, the dispute shall be determined as provided in Article 15 hereof." And Article 15 is as follows:

"ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall proceed diligently with the work as directed."

28 Plaintiff did not appeal to the head of the department as the contract required. In plaintiff's reply brief it argues that this failure was a "pure technicality" which should not defeat its claim.

I do not think that plaintiff can transfer its claim from the forum in which it expressly agreed that such dispute should be decided to this court, merely by neglecting or refusing to present its claim in the agreed forum. Silas Mason Co. v. United States, 90 C. Cls. 266; Fitzgibbon v. United States, 52 C. Cls. 164; Jacob Schlesinger, Inc. v. United States, 94 C. Cls. 289. If it had exhausted its remedy there, and this court were of the opinion that the treatment there accorded it was "fraudulent" or "so grossly erroneous as to imply bad faith" (Sweeney v. United States, 109 U. S. 618, 620; Silas Mason Co. v. United States, supra, at 275; G. F. Pawling Co. v. United States, 60 C. Cls. 699, 712), relief would be available here. But where the agreed remedy has not even been pursued, there can be no assumption that relief would not have been obtained, if sought.

We do not have here a situation like that in Smith v. United States, 256 U. S. 11. There the conduct of the contracting officer, whose decision was, according to the contract, to be final, was described by the Supreme Court as "repellant of appeal or of any alternative but submission with its consequences." There the engineer officer required the contractor to excavate for 18 cents a yard material like that for which $2.24 a yard was paid under another contract. Here there is no showing of arbitrary

or threatening conduct on the part of the contracting officer, and the final authority, the head of the department, was not appealed to at all. Here the contracting officer's decision as to the price was near enough to being right so that the plaintiff's subcontractor was willing to agree to do the work for that price, if it turned out to be all that plaintiff received from the Government.

One basis for the opinion of the majority, and the sole basis for the concurring opinion, is the conclusion that plaintiff was not obliged to appeal its disagreement with the contracting officer to the head of the department because that dispute
29 concerned a question of law rather than a question of fact.

I do not understand why the question whether fair compensation for moving earth from one place to another is 14.43 cents per yard, or some other number of cents, is a question of law. It would be a question for the jury in any suit where trial by jury was had. The language of the Supreme Court of the United States in Case v. Los Angeles Lumber Company, 308 U. S. 106, is relied upon in the majority and concurring opinions. By the terms of Section 77B of the Bankruptcy Act, 48 Stat. 912, the question of what constituted a "fair and equitable plan" was to be decided by the court and not by various percentages of the security holders, and the Supreme Court so held. That opinion seems to me to use the phrase "question of law" merely as a short hand expression, meaning, as the court held, that the question was one for the court under the statute. The Case decision does not therefore seem to me to be helpful in our case.

For the reason that plaintiff did not pursue the remedy which, in the contract, it agreed to pursue and abide by, I would dismiss its petition.

JONES, Judge, concurs in this opinion.

31 V. *Judgment of the court*

January 5, 1942

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore ordered and adjudged that plaintiff recover of and from the United States thirteen thousand nine hundred eighty-nine dollars and ninety-two cents ($13,989.92).

32 VI. *Proceedings after entry of judgment*

On February 19, 1942, the defendant filed a motion for an Order re compliance with Rule 99 (b), which was allowed by the court on the same day.

On February 19, 1942, the defendant file portions of the record which were deemed material to errors assigned, together with a notice of intention to file a petition for certiorari, and an application therefor.

On February 26, 1942, the plaintiff filed a request for other parts of the record material to errors assigned together with the other parts of the record requested.

33 *Order settling record*

The defendant having filed a petition for writ of certiorari to the Supreme Court in the above-entitled case, and both plaintiff and defendant having requested that certain portions of the evidence which are attached hereto be included in the record to be certified to the Supreme Court, and the court having found that both portions are accurate transcripts of the original record material to the errors assigned, the same are hereby this 14th day of Marc., 1942, approved as the record to be certified to the Supreme Court.

By the court:

RICHARD S. WHALEY,
Chief Justice.

35 OTHER PARTS OF THE RECORD MATERIAL TO ERRORS ASSIGNED (TOGETHER WITH CONTRACT, SPECIFICATIONS, AND MAP MADE A PART OF THE COURT'S SPECIAL FINDINGS BY REFERENCE)

36 *Parts of the record requested by defendant*

TRANSCRIPT OF TESTIMONY

In the United States Court of Claims

No. 43102

CALLAHAN WALKER CONSTRUCTION COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

WASHINTON, D. C.

[Trans., p. 1] Thursday, January 21, 1937, 10:00 o'clock A. M. The parties met, pursuant to notice of the Commissioner, at the time above stated, in the Hearing Room, Court of Claims Building, Washington, D. C. Present: Hon. Clyde A. Norton, Commissioner; Robert A. Littleton, Esq., Counsel for Plaintiff; E. T. Fell, Esq., Counsel for Defendant.

[Trans., p. 6] KEITH WASSON, a witness produced on behalf of the plaintiff, having been first duly sworn by said Commissioner, was examined and, in answer to interrogatories, testified as follows:

By Mr. LITTLETON:

* * * * *

[Trans., p. 7] 7. Q. In August 1931, what was your occupation?
A. Construction superintendent.
8. Q. What company were you connected with at that time?
A. Callahan & Walker Construction Company of Omaha, Nebraska.
9. Q. What position did you hold with them?
A. Superintendent.

* * * * *

By Mr. LITTLETON:

[Trans., p. 32] 130. Q. At what later date did you have a conference with Lieutenant Pence in reference to the construction work to be done between Sections 5123 and 5113?
A. October 13.
131. Q. You had a conference with him October 13?
A. Yes, sir.

* * * * *

[Trans., p. 40] 157. Q. What agreement, if any, was reached between you and Lieutenant Pence with reference to Callahan-Walker Construction Company building the river side berm under the new design and completing the levee construction between those ten stations, Stations 5123 and 5113?
A. We did not come to an agreement on the 13th.

* * * * *

162. Q. Did you go back to see him then on October 14?
[Trans., p. 41] A. Yes, sir. Yes; we went back on October 14 to discuss this with him.
163. Q. What happened at the conference of October 14?
A. He told us the next morning—this is October 14—that he wished we would build the river side false berm. He asked us to build the river side false berm and top those stations out, complete them, between Stations 5123 and 5113, and that they would build the land side false berm with Government forces, and we objected to that. We told him that that was a change in design, and that we would have to go outside of the right-of-way limits to get this material, and that it was work outside of the scope of the equipment that we had planned for that work, and that we wanted additional compensation for it. We had quite an argument there that morning.

164. Q. Mr Walker was with you at the time?

A. Yes, sir; we were there together, and we finally told him we would not do it, and we did not know whether we would
37 move on, or what we would do. So we left his office and we went to the telephone office and Mr. Walker talked to Major Larkin at Vicksburg, the District Engineer. And after he talked to Major Larkin, we came back and went back to see Lieutenant Pence, and we told him that we were going to proceed.

165. Q. Going to do what?

A. We were going to proceed; that we would proceed and go [Trans., p. 42] ahead and build this river side false berm and top those stations out, and that we would send him a bill for our extra costs after the work was done.

* * * * * *

By Mr. FELL:

[Trans., p. 146] 620. X Q. After you received Defendant's Exhibit A, which [Trans., p. 147] is the letter from the contracting officer to the Callahan-Walker Construction Company, dated October 18, 1932, and you saw that it was the Government's intent, as expressed in the letter, that you should be paid on the basis of 14.43 cents per cubic yard for the additional material required in the enlarged false berm, did you, or the Callahan-Walker Construction Company, make any written protest or objection to anyone?

A. Not to my knowledge.

* * * * * *

[Trans., p. 171] The parties met pursuant to the Notice of the Commissioner, at Vicksburg, Mississippi, Thursday, January 5th, 1939, at 10 o'clock A. M., in the Court Room of the United States District Court at Vicksburg, Mississippi. Present: Hon. Ewart W. Hobbs, Commissioner; Robert A. Littleton, Esq., Counsel for Plaintiff; William A. Stern, II, Counsel for Defendant; G. V. Palmes, Counsel for Defendant.

* * * * * *

[Trans., p. 190] The next witness called for the Plaintiff was MARK C. WALKER, who after being first duly sworn, testified as follows:

Mr. LITTLETON:

1. Q. What connection did you have in 1932 with the Callahan Walker Construction Company?

A. I was President.

2. Q. President of the corporation?

* * * * * *

A. I was President; yes, sir.

[Trans., p. 199] 54. Q. Who was the area engineer?

The COMMISSIONER. Of the plaintiff or the Government?

Mr. LITTLETON. Of the Government.

A. Lieutenant Pence of Greenville.

* * * * *

[Trans., p. 201] 64. Q. Who did you discuss it with at that time?

A. I come down to see Major Larkin and he told me to see Lt. Pence.

65. Q. Where was Lt. Pence located?

A. He was at Greenville, Mississippi.

66. Q. What date was it you discussed the matter with Lt. Pence?

A. That was the same date—the 13th of October.

67. Q. What did Lt. Pence tell you at the time?

A. He told me it was a foundation failure, and that they thought they would take it over, and asked us to top out the ten stations after they built the river-side and land-side false berm.

68. Q. Was any one with you at the time you discussed it on the 13th with Lt. Pence?

A. Yes, sir; Mr. Wasson; but that wasn't definite, and he said to come back the next morning.

69. Q. When was the next morning?

A. The 14th.

70. Q. Did you go back to see Lt. Pence on the 14th?

A. Yes, sir; we went back the next morning.

38 71. Q. What was your conversation with him on the 14th?

[Trans., p. 202] A. He told us that he had talked to Major Larkin last night—the night before—and that they had decided to have us build the river-side berm and they would build the land-side berm.

72. Q. Did your Company ever build the land-side berm there?

A. No; that was done by Government forces.

73. Q. Did you agree with Lt. Pence on the 14th that your corporation would build the river-side false berm?

A. No; because we considered it was not in our contract. It was extra work in redesigning the levee, etc.

74. Q. Did you and Lt. Pence reach an agreement at that time about the construction of the river-side berm between Stations 5123 and 5113?

A. No; we did not.

75. Q. What took place after that conversation with Lt. Pence?

A. He said that they had decided to have us build the river-side false berm at the contract price. We told him we could not do it at that price.

* * * * *

Mr. LITTLETON:

[Trans., p. 205] 87. Q. What understanding, if any, did you and Lt. Pence reach on the 14th?

A. Well, he said that they had decided to have us build this false berm at the contract price and top off the levee and sod it. We told him we could not build the false berm at the contract price, but we would do it on a cost-plus basis.

88. Q. Did Lt. Pence agree upon that?

A. No; we could not agree on it; and from what Major Larkin told me the day before and what he told me that evening they changed their method or what they intended to do so I told him we could not do it, and we would probably move off the work and let him have it, so we could not agree and we started out and he wanted to know what we were going to do, and I told him I would like to talk to Major Larkin again. I did not think he had the information right, and I called up Major Larkin and he told me to go ahead and finish the work, and turn in our bills afterwards and they would be given con- [Trans., p. 206] sideration.

89. Q. Did you call Major Larkin on the telephone?

A. Yes, sir; and then I returned and told Lt. Pence we were going to proceed with the work.

* * * * *

Mr. STERN:

[Trans., p. 224]. 32. X Q. Just a few days after this conversation, and on October 18th, you got a letter from him, did you not?

A. Sure.

33. X Q. Ordering you to build this berm at the contract price?

A. Yes.

34. X Q. Also relieving you of certain things?

A. Yes, sir.

* * * * *

37. X Q. Did you within thirty days after you got this letter on October 18th, 1932, appeal to the Secretary of War from that decision?

A. No; because we did not think it was necessary.

38. X Q. I ask to have the latter part of the answer stricken out.

The COMMISSIONER. It will be so stricken.

* * * * *

[Trans., p. 248] The next witness for the defendant, Colonel T. B. LARKIN, after being first duly sworn, testified as follows:

* * * * *

Mr. STERN:

[Trans., p. 249] 3. Q. And in 1932 what was your rank and occupation?

A. Major, District Engineer of the Vicksburg District.

4. Q. And were you the Major T. L. Larkin who was the 39 contracting officer and signed the contract in this suit of Callahan-Walker Construction Company for the Lake Lee Setback Levee?

A. I was.

* * * * *

Mr. STERN:

[Trans., p. 250] 11. Q. You ordered the berm constructed by Callahan-Walker Company?

A. I did.

12. Q. Pursuant to what section of the contract did you give that order?

A. Pursuant to Paragraph 14 of the Specifications.

13. Q. Did you think that it was necessary and expedient to carry out the intent of the contract to make that change in the Specifications?

A. I did.

* * * * *

[Trans., p. 252] 20. Q. When you ordered Mr. Walker to do this work at [Trans., p. 253] 14.43¢ per cubic yard, did you think that was a fair price?

A. I did.

21. Q. After you issued the order and before the completion of the work, did you receive any protest from Mr. Walker about doing the work at that price?

A. No written protest.

22. Q. Just an oral protest?

A. An oral protest I did receive.

23. Q. And thereupon you wrote to him on October 18th?

A. On October 18th, confirming instructions which had been given to him—by Lt. Pence at my direction on October 14th. This letter confirmed those instructions.

24. Q. Now within thirty days thereafter did the plaintiff make any appeal pursuant to Article 15 of the contract?

A. He did not.

The COMMISSIONER:

Do you mean appeal to the Colonel here, or to the head of the Department? Would you know if an appeal had been taken?

A. Yes; because in general those appeals come through the District Engineer, who forwards them to the higher authority.

Q. And you were the District Engineer at that time?

A. Yes, sir.

* * * * * *

Mr. STERN:

[Trans., p. 254] 25. Q. Are you familiar today with the situation out at the site of that work?

A. Yes, sir; I visited the site of the work yesterday.

26. Q. But I mean, do you recall today, what the condition was then?

A. Yes, sir; I do.

27. Q. According to your best recollection what was the condition in the barrow pits opposite the stations with respect to a sufficiency of suitable material for building the berm and topping out the levee?

A. According to my recollection there was sufficient material opposite those stations in the limits of the right-of-way for the completion of the river-side false berm, and completing the levee.

* * * * * *

Mr. LITTLETON:

[Trans., p. 282] 50. X Q. You were not out there while they were doing any of the construction?

A. Oh, yes; I was up there a great deal of the time.

51. X Q. Were you there when he was building this false berm?

A. Yes, sir.

52. X Q. Did you observe the kind of material that was in the [Trans., p. 283] ground immediately in front of these sections?

A. Yes, sir.

53. X Q. Was it suitable?

A. As far as I recollect it was.

54. X Q. You don't have any recollection about that?

Mr. STERN. I object to Counsel's statement.

The WITNESS: A. Yes, sir; I do recollect. You cannot put the words in my mouth.

Mr. LITTLETON:

55. X Q. I want you to say whether it was suitable?

Mr. STERN. I object. He says according to his recollection it was suitable.

The COMMISSIONER. He says that is his recollection.

The WITNESS. In my recollection it was suitable.

Mr. LITTLETON:

56. X Q. You think it was good?

A. I think it was satisfactory for the levee.

57. Q. And you would have been satisfied for them to build the levee out of material that lay immediately in front of that section?

A. Yes sir.

[Trans., p. 284] 58. X Q. Is that why you directed them to go on and build it at the contract price because you thought there was suitable material there?

A. The reason I directed them to do it at the contract price was because I thought Paragraph 14 gave me the power to do it.

59. X Q. And you didn't care what it cost him? You must have had some kind of inspection of the material?

A. I did.

60. X Q. And you did it because you then determined that that material in front of those sections was suitable for building the levee?

A. That was one of the grounds.

61. X Q. You did it on that particular ground?

A. I did it on various grounds.

62. X Q. You didn't want them to go out and lose money?

A. No; I did not.

63. X Q. If you had thought the ground in front of those sections was not suitable for building the levee, and it was necessary for them to rehandle the material that went into the levee, would you have compelled them to go out there and get the material and build that false berm that was not specified in the original contract at the contract price?

* * * * *

The WITNESS:

[Trans., p. 285] A. What do you mean by rehandling?

Mr. LITTLETON:

64. X Q. I mean in order to put it available to the head tower?

A. You mean as a necessity? It would have been necessary to do that in order for the head tower to handle it.

65. X Q. Yes.

A. In that case I do not believe I would have required the contractor to do that at the contract price, but in my opinion——

66. X Q. They protested, did they not, to you at the time they were negotiating with you about building that berm?

A. Yes, sir.

67. X Q. And they protested on the ground that there was not suitable material in front of those stations?

A. No, sir; I don't recall that all—the protest was on some other ground than that. There was no question in my mind about the tower machine being able to reach the material, for the reason that the distance from the central line of the levee to the outer limit of the barrow pit on those ten stations was only 925 feet. The tower was 125 feet high. With a tower, say 97 feet high, we have reached 1,100 feet, so there wasn't any
41 question that his tower could reach it without the slightest [Trans., p. 286] trouble. Machines like that can reach 1,100 feet without any difficulty.

* * * * *

By Mr. LITTLETON:

[Trans., p. 308] X Q. 190. And you want to state to us, as a fact not subject to contradiction, that there was suitable material within the right-of-way limits of the contractor between stations 5123 and 5113, that he could have handled by his tower machine, complete the false berm, top off the levee, without encountering material that would cause slides, if it had been put into the levee?

A. I state, as a fact, that there was sufficient suitable material opposite those stations under construction, to complete that work.

* * * * *

[Trans., p. 500] ARTHUR W. PENCE, a witness produced on behalf of the defendant, having been first duly sworn by said commissioner, was examined, and in answer to interrogatories, testified as follows:

* * * * *

By Mr. STERN:

[Trans., p. 501] Q. 6. In 1932, what were you doing?

A. I was Area Engineer in charge of the Greenville area in the Vicksburg District.

* * * * *

[Trans., p. 503] Q. 19. Going now to the date of October 13, on that date, did you have any conversation with any representative or representatives of the plaintiff?

A. On the evening of October 13, Mr. Walker, and I believe Mr. Wasson was with him, came up to Greenville to see me with regard to what was going to be done on his item, and I told him that we were making investigations and had not yet reached a decision as to just exactly what we did want to do; and there

was some general conversation as to various plans that might be adopted. I told him to come back in the morning, and I would be able to give him a definite answer.

* * * * *

[Trans., p. 504] Q. 23. Now, going to October 14, did you have a conversation on that day?

A. Yes; Mr. Walker, and I believe Mr. Wasson, came down to my office in Greenville, and at that time I told them that the Government had reached the decision to direct Mr. Walker to proceed under his contract to build the first river side false berm, of which I gave him the dimensions, and then to top out the levee between Stations 5113 and 5123; and that we would accept, as 100 percent complete as to embankment only, that portion of the levee which lay south of 5123.

Q. 24. Did you say what price would be paid?

A. No; I directed that work to be done under the terms of the contract.

* * * * *

[Trans., p. 505] Q. 26. Now, when you stated that to Mr. Walker, when you directed him to proceed at the contract rate, what did he say?

A. He refused to proceed and said he would go down and talk to Colonel Larkin at Vicksburg.

Q. 27. Then what happened?

A. He went out of the office, but later in the day he came back and said he had talked to Colonel Larkin, that he had decided to proceed with the instructions that I gave him early in the day, and I told him that would be confirmed by a letter.

Q. 28. And do you know whether they were, thereafter, confirmed by a letter?

A. Yes, sir; the United States Engineer wrote him a letter about the 18th of October.

42 Q. 29. I show you Defendant's Exhibit A, and ask you whether that is the letter that was sent to him, to your knowledge?

A. Yes, sir.

Q. 30. Thereafter, did you receive any written protest?

A. I did not.

Q. 31. Thereafter, and through you, was any appeal made to the Chief of Engineers?

A. No, sir.

Q. 32. Now, it has been testified that it was necessary [Trans., p. 506] in order to build the false ber.. for the contractor to go outside of the right-of-way limits of the borrow pits, and to drift

material from stations other than those opposite stations 5123 to 5113. What can you tell us about the actual conditions there?

A. The actual condition was, that there was ample material within the borrow pit to construct a levee between Stations 5113 and 5123, and also to construct the false berm, and this material did not take all of the material that was available in the borrow pit; and my recollection of it was that it was in proper condition, that it was sufficiently dry and of the right character to have made a good levee, and good berm. Now, as to whether the contractor actually went out of the right-of-way limits, I don't recollect that he did. Certainly, there was no request made on the Government for additional right-of-way, which is the usual procedure when a contractor goes out of the right-of-way limits.

* * * * * *

By Mr. LITTLETON:

[Trans., p. 538] X Q. 218. You hadn't given him that order on the 14th, had you?

A. I did give him the order on the 14th; yes.

X Q. 219. What was your order then?

A. My order was substantially what you find in this letter here.

X Q. 220. That was your order?

A. Yes; that was a verbal order to proceed.

X Q. 221. A verbal order?

A. Yes, sir.

X Q. 222. You stopped him verbally at 5123? You stopped him on the 7th, verbally, at 5123?

A. Yes, sir.

X Q. 223. And then you had a conference with him on October 13th?

A. Yes, sir.

X Q. 224. And you didn't come to any understanding on the 13th, did you?

A. No, sir.

X Q. 225. But you did discuss the construction of the false berm between 5123 and 5113?

A. Yes, sir.

[Trans., p. 539] X Q. 226. When he left your office on the 13th, what was the conclusion reached at your conference, at that time?

A. There was none reached.

X Q. 227. No conclusion reached, at that time, at all?

A. No, sir.

X Q. 228. Now, he came back to your office on the 14th?

A. Yes, sir.

X Q. 229. And what did he tell you then?

A. He asked me then as to what we wanted to do, and I gave him orders to proceed with the false berm and topping out the levee.

X Q. 230. You didn't do that until the 14th?

A. Yes; that is correct.

X Q. 231. Did you tell him that he would do it at the contract price, at that time?

A. Yes, sir.

43 X Q. 232. What did he say then?

A. He said he wouldn't do it.

X Q. 233. He said he wouldn't do it?

A. Yes, sir.

X Q. 234. Did he ever come back to you that day?

A. Yes; he came back later that day.

X Q. 235. Later on the 14th?

A. Yes, sir.

X Q. 236. Then what did he say?

[Trans., p. 540] A. He said he would do it.

X Q. 237. Did he say he had had any conversation with anybody in the meantime?

A. He said he had talked with Colonel Larkin.

X Q. 238. Did he say anything about submitting a statement of the cost of his equipment then?

A. No, sir.

X Q. 239. He didn't tell you that?

A. No, sir; he said he still didn't like the order, and I told him, under the contract, he had a perfect right to register a protest in writing to the effect that he didn't like the order, but that he would have to proceed with the work.

X Q. 240. That was your order?

A. Yes, sir.

X Q. 241. Then you reported to Major Larkin what you had done?

A. Yes, sir; I was acting under his instructions and in thorough agreement with him as to what was to be done.

* * * * *

By Mr. LITTLETON:

[Trans., p. 568] X Q. 399. I understand you had conversations with Mr. Walker and Mr. Wasson on October 13 and 14, 1932, with reference to the construction of the false berm, the river-side false berm between Stations 5113 and 5123. Was anything said about him submitting to your office or Major Larkin's office a statement of the cost of building that berm?

A. I think he told me that he was going to keep a very accurate record of his costs, with the idea of ——

X Q. 400. Submitting a claim?

A. Asking for additional money; and of course, all I could tell him was, that he had a right to protest the ruling of the District Engineer; that he could go ahead and do this work, if he wanted to, and could keep whatever costs he pleased.

X Q. 401. Was a statement of that cost submitted to your office, before you left there? Did he submit a statement of costs through your office?

A. No sir.

X Q. 402. He didn't submit it through your office?

A. No, sir.

* * * * *

44 *Parts of the record requested by plaintiff*

TRANSCRIPT OF TESTIMONY

In the United States Court of Claims

No. 43102

CALLAHAN-WALKER CONSTRUCTION COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

WASHINGTON, D. C.

[Trans., p. 1] Thursday, January 21, 1937, 10:00 o'clock A. M. The parties met, pursuant to notice of the Commissioner, at the time above stated, in the Hearing Room, Court of Claims Building, Washington, D. C. Present: Hon. Clyde A. Norton, Commissioner; Robert A. Littleton, Esq., Counsel for Plaintiff; E. T. Fell, Esq., Counsel for Defendant.

* * * * *

[Trans., p. 6] KEITH WASSON, a witness produced on behalf of the plaintiff, having been first duly sworn by said Commissioner, was examined and, in answer to interrogatories, testified as follows:

* * * * *

By Mr. LITTLETON:

[Trans., p. 24] 92. Q. Mr. Wasson, what happened on the Lake Lee Set-back Levee at station 5123, shown on the plat?

A. At station 5123 the Government Engineers asked us to stop building the levee there.

* * * * *

[Trans., p. 24] 94. Q. The contract did call for certain false berms to be constructed, did it not?

A. Yes; in certain localities. Item A called for 22,000 yards there, I think.

[Trans., p. 25] 95. Q. My question, awhile ago, was what happened at station 5123 with reference to foundation failure of the levee, if anything?

A. For several days before we had gotten to 5123, we had experienced foundation failure. We had about half a mile of levee to go down; I think 23 stations, if I am not mistaken.

* * * * *

[Trans., p. 26] 99. Q. Had you done any partial work on the construction of the levee in ahead of section 5123?

A. Yes. We had done quite a bit of work at the next ten stations directly ahead—the next ten stations directly ahead of station 5123 were almost 75 percent completed.

100. Q. Was construction stopped at station 5123?

A. Yes; they asked us to stop and move ahead to station 5113 and then proceed.

* * * * *

[Trans., p. 27] 105. Q. Now, at station 5123, was there any subsidence on the landward side of the Lake Lee Set-back Levee?

A. The levee would break just landward of the crown and go nearly straight down.

* * * * *

107. Q. Did your contract call for any landside berms [Trans., p. 28] at those stations?

A. I think not.

* * * * *

45 [Trans., p. 29] 115. Q. Were false berms specified in the contract and specifications from station 5123, immediately after station 5123, sufficient to sustain the overburden of the completed [Trans., p. 30] levee?

Mr. FELL. At which time do you mean, sir; when he moved, or when he came back and did it later?

Mr. LITTLETON. When he moved; when they ordered him to move.

The WITNESS. I cannot say that it was or was not. We never did complete that section. We never did complete the sections called for in the contract between 5123 and 5113 until after more work had been done.

Mr. LITTLETON:

115. Q. That is what I was asking; what was necessary to be done in order for that levee to be completed according to the contract and specifications?

A. I think I have answered that.

116. Q. Well, when the Government stopped Callahan-Walker Construction Company at station 5123, did you have a conference, you and Mr. Walker, or anyone else have a conference with the Government Engineers regarding the construction work that was to be done from section 5123 to section 5113?

A. Yes.

117. Q. Who was the Government's representative with whom you held that conference?

A. With Lieutenant Pence, the Area Engineer.

118. Q. Did he say anything, at that time, in reference to increasing the quantity of material in the false berm on the [Trans., p. 31] river-side edge of the levee between stations 5123 and 5113?

A. He said he did not know what they were going to do; that they were taking borings and he did not know what they were going to do after that.

* * * * *

[Trans., p. 31] 121. Q. And was any order given you in respect to any further construction of the levee under the contract?

A. They told us they did not want us to do any more work between stations 5123 and 5113 at that time.

* * * * *

[Trans., p. 32] 126. Q. Do you know the approximate date when you were stopped at station 5123?

A. Yes, sir.

127. Q. What was that date?

A. October 7.

* * * * *

130. Q. At what later date did you have a conference with Lieutenant Pence in reference to the construction work to be done between sections 5123 and 5113?

A. October 13th.

131. Q. You had a conference with him October 13th?

A. Yes, sir.

132. Q. Was anything said, at that time, at that conference about letting bids for the construction work to be done [Trans., p. 33] between sections 5123 and 5113?

A. Yes, sir. At that time they asked us to complete these stations, after we had built our river-side false berm—add on a bigger and wider berm and build that and then complete the levee.

* * * * *

46 134. Q. Yes, Mr. Wasson, after you were stopped at station 5123 on October 7th what happened thereafter in reference to the completion of the construction of the levee be-

tween stations 5123 and 5113? Will you explain that to us in full?

A. After we were stopped at station 5123, the Engineers told us they did not know just what they wanted to do with it. They had a lot of men out there making borings. They had an expert there by the name of Middlebrook. He took borings all over that pit and the berms and the levee on the land side and river side; and it was not until October 13th that we had the conference with Lieutenant Pence, and they decided what they wanted to do. We thought that they should take over all of this old levee, the completed levee that had subsided at the ten stations between 5123 and 5113.

* * * * *

By Mr. LITTLETON:

[Trans., p. 34] 136. Q. I interrupted you, Mr. Wasson. Will you please go forward and explain what was done?

A. Yes, sir. We were anxious to find out just what they were going to do with the whole thing. We wanted to get our obligations on this contract all cleaned up and move out to another job. So, on October 13, Mr. Walker went down to Vicksburg to see Major Larkin and he came back and told me that Major Larkin asked him——

* * * * *

By Mr. LITTLETON:

[Trans., p. 35] 141. Q. Mr. Wasson, you may proceed with what you were telling when we recessed for lunch.

A. And he asked us if we would wait until they had hired some tractors and wagons and put in the river-side false berm between station 5123 and station 5113; if we would finish that section of levee after they had gotten in this equipment and had built that berm and put in the land-side false berm, if we would wait and finish that complete section and put in our remaining 25% on the original section after they got it done. He proposed that they build both the [Trans., p. 36] land-side and riverside false berms, and that we wait then and finish topping the levee out after they got it done, and we told him no, that we would not do that, because we thought this was a redesigning of that section of the levee and we thought they ought to take all of it, instead of just taking it up to 5123—that they ought to take it all up to 5113.

* * * * *

142. Q. They did take over the levee from 5123, south?

A. Yes; they took that. He said they would take it over 100 percent.

* * * * *

By Mr. LITTLETON:

[Trans., p. 37] 146. Q. Mr. Wasson, I will ask you whether or not there was any change made in the plans and specifications, in reference to the design of the levee to be constructed between stations 5123 and 5113, after you were stopped—after the construction work of the levee was stopped at station 5123?

A. Yes, sir. At this conference with Lt. Pence, he told us they thought it was necessary to put a land-side berm onto the original design, and he put much larger and longer and heavier river-side false berms onto the levee between those stations. That is the work that he proposed that they would do, if we would finish topping this out.

* * * * *

47 [Trans., p. 38] 151. Q. Was there any available material within the limits of the original specifications to complete those sections, according to the new specifications, for the river-side berm, false berm?

A. Right in front of these stations 5123 to 5113, there was a shortage of suitable material for levee construction. Even in putting in the first false berm, and the ma- [Trans., p. 39] terial that was called for in the original design, it was necessary for us to drift the material. What I mean, when I say "drift," is that we took the material from stations, opposite stations other than where it went into the levee. Right directly opposite these stations there was not enough suitable material to finish it, so we had to go out each way and get this material and bring it in. Well, when they increased this section, or these ten sections, that would then have made it necessary for us to go farther out, and outside of the right-of-way limits, in order to secure suitable material to build the levee in this section.

152. Q. Would your tower machine reach that material that would have been necessary for you to go to, in order to complete that section?

A. No.

* * * * *

154. Q. Who built the land-side berm of the levee between these ten stations, 5123 and 5113, after the change was made?

A. It was built by the Government's hired forces. They built it, themselves, on the land side.

* * * * *

[Trans., p. 40] 157. Q. What agreement, if any, was reached between you and Lieutenant Pence with reference to Callahan-Walker Construction Company building the river-side berm under the new design and completing the levee construction between those ten stations, stations 5123 and 5113?

A. We did not come to an agreement on the 13th.

* * * * *

160. Q. Did you agree to top it out, after he had done that false berm work?

A. No; we never did. So he told us to come back the next morning and talk to him.

* * * * *

162. Q. Did you go back to see him then on October 14?

[Trans., p. 41] A. Yes, sir. Yes; we went back on October 14 to discuss this with him.

163. Q. What happened at the conference of October 14?

A. He told us the next morning—this is October 14—that he wished we would build the river-side false berm. He asked us to build the river-side false berm and top those stations out, complete them, between stations 5123 and 5113, and that they would build the land-side false berm with Government forces, and we objected to that. We told him that that was a change in design, and that we would have to go outside of the right-of-way limits to get this material, and that it was work outside of the scope of the equipment that we had planned for that work, and that we wanted additional compensation for it. We had quite an argument there that morning.

48 164. Q. Mr. Walker was with you at the time?

A. Yes, sir; we were there together, and we finally told him we would not do it, and we did not know whether we would move on, or what we would do. So we left his office and we went to the telephone office and Mr. Walker talked to Major Larkin at Vicksburg, the District Engineer. And after he talked to Major Larkin, we came back and went back to see Lieutenant Pence, and we told him that we were going to proceed.

165. Q. Going to do what?

A. We were going to proceed; that we would proceed [Trans., p. 42] and go ahead and build this river-side false berm and top those stations out, and that we would send him a bill for our extra costs after the work was done.

* * * * *

By Mr. LITTLETON:

[Trans., p. 44] 177. Q. Well, I will ask you if, at the time you made your original bid, this reaching out for new material between these stations was taken into consideration?

A. No.

* * * * *

[Trans., p. 45] 180. Q. So the greater portion of the new material was not immediately in front of stations 5123 and 5113?

A. There was not suitable material there. There was material there, but it was not suitable.

181. Q. This new material that you had to go out and reach was not immediately in front of those stations?

A. No, sir.

182. Q. And it could not be handled by a dragline?

A. No; or tower machine, either.

183. Q. How was it brought in?

A. With tractors and wagons.

* * * * *

[Trans., p. 49]

By the COMMISSIONER:

206. Q. What was the matter with this material; why was it not suitable?

A. This particular place in here was an old cypress brake, where this blue hole was, and it had been filled either by a suction dredge or floods, and this material that was in there was a kind of bluish, fine sand, with a high water content. We would dig that top surface off and it would smell bad in there, awful bad in there, and it just was not good material. If we would have used it all, put all that kind of material up in the section, it would not have retained its cross section.

* * * * *

[Trans., p. 53]

By Mr. FELL:

216. Q. Just a second, I want to ask you whether you can quote the opinion of any Government Engineer that corresponds to your statement?

A. Mr. Middlebrook told me that was his opinion at that time. I understand that is his business.

* * * * *

By Mr. LITTLETON:

[Trans., p. 56] 226. Q. Mr. Wasson, you were testifying, a moment ago, about the legends appearing on the Government map, submitted with the specifications, which is plaintiff's
49 Exhibit 3. I will ask you to explain, if you will, the difference between the "A" and "C" borings on that legend?

A. The "A" and "C" shown on the boring legend is to identify the location on the map of where these borings were taken. If you will look on the map at the station as shown on the legend you will [Trans., p. 57] find the "C" or "A," whichever the case may be, designating the location where that boring was taken.

227. Q. Is there any indication that any of those borings were taken between stations 5123 and 5113 on the map?

A. No; there is no indication that I see of borings being taken between those particular stations.

* * * * *

[Trans., p. 58] 236. Q. Do you know why the Government redesigned it. foundation between sections 5123 and 5113?

Mr. FELL. Just answer that yes or no, whether you personally know why the Government did that.

By Mr. LITTLETON:

[Trans., p. 59] 237. Q. Did any of the Government Engineers ever tell you why they did that?

A. Yes, sir.

238. Q. Who?

A. Lieutenant Pence.

239. Q. What was his explanation of it?

A. It was to reduce the hazard of foundation failure.

* * * * *

[Trans., p. 61] 244. Q. Now, your tower machine would not reach that new material that you had to go to, in order to complete sections 5123 to 5113 under your agreement with Lieutenant Pence?

* * * * *

A. No; it was entirely out of the scope of that machine. The most practical way to get that berm material in it was to get cats and wagons in there and haul it in.

* * * * *

247. Q. Would it increase the cost of the haul of that material, the distance?

A. Yes; it increased the cost of all dirt, the farther [Trans., p. 62] you hauled it.

248. Q. Did Callahan-Walker Construction Company have any hauling equipment, such as caterpillar tractors, of its own, and wagons?

A. No; we did not own any hauling equipment.

249. Q. When hauling was required how was it done?

A. We subcontracted it.

* * * * *

By Mr. FELL:

[Trans., p. 143] 603. X Q. In your direct testimony you gave the details of the various conversations that took place between you and Lieutenant Pence in October 1932. Was the agreement which you reached with Lieutenant Pence in these conferences and negotiations ever reduced to writing in any form?

A. No; we never did come to a strict agreement. They did not know, and we did not know, at that time, what this work was going to run to before we got done.

* * * * *

50 [Trans., p. 171] The parties met pursuant to the notice of the Commissioner, at Vicksburg, Mississippi, Thursday, January 5, 1939, at 10:00 o'clock A. M., in the Court Room of the United States District Court at Vicksburg, Mississippi. Present: Hon. Ewart W. Hobbs, Commissioner; Robert A. Littleton, Esq., Counsel for Plaintiff; William A. Stern, II, Counsel for Defendant; G. V. Palmes, Counsel for Defendant.

* * * * *

[Trans., p. 190] The next witness called for plaintiff was MARK C. WALKER, who, after being first duly sworn, testified as follows:

* * * * *

Mr. LITTLETON:

[Trans., p. 193] 17. Q. When your construction work reached station 5123, what occurred?

A. Well, they stopped our operation.

18. Q. Why did they stop it?

A. On account of a subsidence south of that point.

19. Q. Where did that subsidence occur?

A. It started about 5140—I think it was.

20. Q. What was the cause of that subsidence?

A. Foundation failure.

21. Q. How was that subsidence corrected?

A. Well, it was corrected by false berms.

22. Q. On just one side or both sides of the levee?

A. On both sides.

* * * * *

[Trans., p. 202] 73. Q. Did you agree with Lieutenant Pence on the 14th that your corporation would build the river-side false berm?

A. No; because we considered it was not in our contract. It was extra work in redesigning the levee, etc.

74. Q. Did you and Lieutenant Pence reach an agreement at that time about the construction of the river-side berm between stations 5123 and 5113?

A. No; we did not.

* * * * *

[Trans., p. 205] 87. Q. What understanding, if any, did you and Lieutenant Pence reach on the 14th?

A. Well, he said that they had decided to have us build this false berm at the contract price and top off the levee and sod it.

We told him we could not build the false berm at the contract price, but we would do it on a cost-plus basis.

88. Q. Did Lieutenant Pence agree upon that?

A. No; we could not agree on it, and from what Major Larkin told me the day before and what he told me that evening they changed their method or what they intended to do so I told him we could not do it, and we would probably move off the work and let him have it, so we could not agree and we started out and he wanted to know what we were going to do, and I told him I would like to talk to Major Larkin again. I did not think he had the information right, and I called up Major Larkin and he told me to go ahead and finish the work, and turn in our bills [Trans., p. 206] afterwards and they would be given consideration.

* * * * *

[Trans., p. 211] 124. Q. What was the condition with reference to finding suitable material immediately in front of stations
51 5113–5123 as compared to other stations on that section of the levee?

A. Well, I believe we used it all for the original construction—the 70% we had put in the levee, and within the scope of our equipment.

125. Q. Without the building of the false berm there between those stations, was there sufficient material to have topped off the levee?

A. Yes; we left sufficient material to top off the levee.

[Trans., p. 212] 126. Q. That is when you were stopped on this work?

A. Yes, sir.

127. Q. Do you know approximately the quantity of material that was put into the river-side false berm between stations 5113 and 5123?

A. I think around 60,000 cubic yards.

128. Q. At the time you started the construction of the river-side false berm between stations 5113 and 5123 on October 15th, who furnished you with the design as to the dimensions of that construction?

A. Lt. Pence told us what they wanted.

129. Q. At the time you had the conference with Lt. Pence on October 14th, 1932, was any memorandum made at that time?

A. Yes, sir; at the time he told me I wrote down what he wanted done there.

130. Q. Did he make a sketch of the false berm that was to be constructed there?

A. Yes, sir; he sketched it out, just what they wanted.

131. Q. Have you got before you a memorandum that was made at the time of that conversation on which you sketched the dimensions of the river-side false berm between stations 5113 and 5123?

A. Yes, sir.

132. Q. Was that memorandum made at the time you had your discussion with Lt. Pence on October 14th?

A. Yes, sir.

[Trans., p. 213] 133. Q. Did you have any other drawings or plans for the dimensions of the false berm other than that memorandum you have before you?

A. No, sir.

134. Q. Was there any other notations on that memorandum that you made at the time of your conversation with Lt. Pence?

A. Yes, sir; there are a good many notations on there.

135. Q. Referring to those notations, can you refresh in any way your recollection as to the discussion you had?

A. Yes, sir. We were talking about rental prices and I gave him prices of equipment—I have that written down here.

136. Q. What were the prices?

A. On the dragline it was $1,000.00 a day, and on the tower it was $1,500 a day, and on the little dragline—the Monaghan—it was $300, on the Northwest it was $150, and on the bulldozer $5.00 per day, and I also made a proposition that we would do the work for twice the contract price or 28.86. I thought it
52 would cost about that to do it.

137. Q. What was the basis of your objection to building the river-side berm at the contract price?

Mr. STERN. I object; in the first place, it is too general, and, in the second place, it calls for the operation of the witness' mind; if it is something that he [Trans., p. 214] communicated—part of a conversation, I have no objection, but I object to what his reasons were.

The COMMISSIONER. I think the question is objectionable.

Q. You would not do it at the contract price, that is the idea?

A. We could not. From our past experience in moving dirt we knew we could not do it at the contract price.

* * * * *

By Mr. LITTLETON:

[Trans., p. 215] 148. Q. At the point where it was necessary for you to get the material to build the false berm how many handlings would have been necessary in the use of your ordinary equipment—the equipment on the ground there—your equipment?

A. It would take three or four handlings. That is, you would first have to pick it up with the bucket and move it over, and then

walk the dragline around and pick it up again two or three times, and when you handle that material when it is wet it is not very good material to put in false berms or levee; it is kneaded up like dough.

* * * * *

[Trans., p. 218] 162. Q. When did you submit your claim that is made the basis of this controversy?

A. Shortly after the work was completed.

163. Q. Did you have any conversation with the contracting officer in connection with the submission of your claim?

A. Yes, sir; I submitted the claim to Major Larkin on the 6th of December. I did not hear from him, so it was kind of unofficial—I didn't know whether it was made up in proper form, and I didn't hear from him, and I submitted it officially on December 28, 1932.

* * * * *

Mr. STERN:

[Trans., p. 222] 20. X Q. And your right-of-way was in front of these pits—say 925 feet from the center line, was it not, and I ask you to refer to those maps?

A. Yes, sir; that is what it shows here.

* * * * *

[Trans., p. 223] 26 X Q. Have you a pretty good memory, Mr. Walker?

A. I don't know; try me out.

27. X Q. When you were giving your testimony as to these particular conversations, and you said certain things—or rather certain words were used, you were not stating, were you, that those exact words were used?

A. They meant the same thing to me. I do not think anyone can remember the exact words of a full conversation of any kind.

28. X Q. That is right; now, when you spoke to Major Larkin over the telephone he did not tell you, did he, that he would pay you on a cost-plus basis?

A. No.

53 29. X Q. He said he would consider it, didn't he? Was that what he stated to you—consider doing so?

A. Well, a contractor has rights as well as——

30. X Q. I want to know what he said; what is your best recollection of what he said?

A. He said to proceed with the work, and if we thought it was extra work, to file a bill at the completion of the work.

31. X Q. He told you to take an appeal from his decision if you did not agree with what he was saying?

A. No; I don't remember that. If he had told us that, at that time, we would not have gone on with the work.

[Trans., p. 224] 32. X Q. Just a few days after this conversation, and on October 18th, you got a letter from him, did you not?

A. Sure.

33. X Q. Ordering you to build this berm at the contract price?

A. Yes.

* * * * *

35. X Q. Did you appeal from that decision to the Secretary of War within thirty (30) days after that?

A. After the work was completed; we did.

36. X Q. No; 30 days after you received the order to do this work?

A. If we are working on a cost-plus basis, we do not know what it is going to cost until it is finished.

* * * * *

Mr. LITTLETON:

[Trans., p. 225] 168. Q. Mr. Stern has asked you about a letter received from Major Larkin dated October 18, 1932, what was the Callahan-Walker Construction Company doing at the time that letter was received?

A. We were building the riverside false berm.

169. Q. And how many days had you been engaged in that work at the time you received that letter?

A. At the time we received it I would say four or five days—had it pretty well organized by that time.

* * * * *

174. Q. You were in there in pursuance of an understanding you had arrived at with Lt. Pence—from your conver- [Trans., p. 226] sation on October 14th?

* * * * *

[Trans., p. 226.]

Mr. LITTLETON:

179. Q. I will ask you if it was your understanding at the time you went in there on the 14th that they would pay you only 14.43¢ for the material that went into the false berm?

[Trans., p. 227.]

The COMMISSIONER. What did Colonel Larkin agree to pay you?

A. I do not know that he promised anything. We told him what we would do it for and he told us to do it.

Mr. LITTLETON:

180. Q. Did he make any statement as to what the Government would pay for this work on the false berm?

A. He told us that if we thought we had any rights we would have to make a bill for it and present it at the completion of the work, and then three or four days later he wrote this letter and said what he would do.

* * * * * *

54 [Trans., p. 228] 184. Q. How did that come to be suggested?

A. We contended that we considered it was outside of our contract, and it was extra work.

185. Q. And he said he thought it was inside the contract?

A. They didn't one day, and then the next day they did.

186. Q. Which conversation are you referring to when he said it was inside, and which one when he said it was outside?

A. On the 13th day they said they would relieve us of all the berm?

187. Q. Who said that?

A. Major Larkin thought they would and for us to see Lieutenant Pence, and that night he said that is what he thought they would do, but to go back next morning, so they gave us definite instructions the next morning along the lines of this letter. We told them we could not proceed on that basis, but we would proceed on the basis of a cost plus.

* * * * * *

[Trans., p. 290] Friday, January 6, 1939, at 10:00 o'clock A. M. Testimony for defendant (resumed). The parties met, pursuant to the recess previously taken, at the time above stated, in the District Court Room, Federal Building, Vicksburg, Mississippi.

Colonel T. B. LARKIN resumed the stand, and testified further as follows:

* * * * * *

By Mr. STERN:

[Trans., p. 341] R. D. Q. 379. At the time you were having these discussions [Trans., p. 342] with regard to the building of the false berm, was there anything said about keeping time?

A. Yes, sir; Mr. Walker discussed the whole question with me, and I understood that Mr. Walker was going to submit a claim. I advised Mr. Walker that, if he was going to submit a claim, to keep the accurate time on the various pieces of equipment, as to what they were doing, so that, if he did submit his claim, then

it would be clear and there would be no argument about that point.

* * * * *

WASHINGTON, D. C.

[Trans., p. 500] Thursday, July 27, 1939. At 10:00 o'clock A. M. Testimony for defendant. The parties met pursuant to notice of the Commissioner at the time above stated in the Hearing Room, Court of Claims Building, Washington, D. C. Present: Hon. Richard H. Akers, Commissioner; R. A. Littleton, Esq., Counsel for Plaintiff; William Stern, III, Esq., Counsel for Defendant.

ARTHUR W. PENCE, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined and in answer to interrogatories, testified as follows:

* * * * *

55 By Mr. STERN:

[Trans., p. 504] Q. 25. Did the work of building the false berm necessitate a redesign of the levee?

A. It did not. The same section of levee was used [Trans., p. 505] between those stations as had been used elsewhere and was designed for that particular section.

* * * * *

By Mr. LITTLETON:

[Trans., p. 523] X Q. 119. So if a berm is necessary in a section, it would be a part of the design of the levee, wouldn't it? A false berm would be a part of the design of the levee?

A. It is a part of the design of the foundation which goes out in front of the section. It is no part of the section.

X Q. 120. It is no part of the section?

A. No, sir.

X Q. 121. It ties in with the toe of the levee?

A. Well, it lays against the section, but in showing a levee design and a berm design, the two are separated by the line which forms the slope of the levee.

X Q. 12[illegible]. A berm is necessary in order to hold the foundation of the heavy material that you put on the crown?

A. The berm is to reinforce the foundation, so that the natural foundation will carry the load of the levee.

X Q. 123. It is a part of the foundation of the levee?

A. That is right.

* * * * *

By Mr. LITTLETON:

[Trans., p. 528] X Q. 160. What was the basis of the objection of the Callahan-Walker Construction Company to completing the

levee construction, together with adding the river-side [Trans., p. 529] false berm, between stations 5123 and 5113?

Mr. STERN. I object to the form of that question.

The COMMISSIONER. You mean, what did they tell him?

The WITNESS. There was no formal objection. They submitted no written protest, at all.

* * * * * *

By Mr. LITTLETON:

X Q. 162. They talked with you quite a bit about it, didn't they?

A. They came up and talked about it; yes, sir; and they told me they didn't think they should be required to do that work.

* * * * * *

[Trans., p. 530] X Q. 167. It wouldn't have taken a long time to tell you that he didn't think he ought to do it. He must have had some reason for it. Did he give you that reason?

A. He thought that—he said he didn't think it could be done under the contract.

X Q. 168. He didn't think it could be done under the contract?

A. That it could be required to be done under the contract.

X Q. 169. Why didn't he want to do it under the contract?

A. He had a contract with the Government to do certain work.

X Q. 170. What reason did he give?

A. He didn't think it was in the provisions of his contract and we couldn't order him to do it. He thought the Government ought to take it over and do it, themselves, with their own forces.

56 X Q. 171. Did you ever state to him that was what you were contemplating doing?

A. Yes, sir.

* * * * * *

[Trans., p. 531] X Q. 174. You were going to let bids for the river-side false berm, weren't you?

A. For the equipment, but the construction of it was to remain as a hired labor job, under my office.

X Q. 175. Did you say you were going to let a contract for it?

A. No, sir; not for the construction of the berm. We proposed to let a contract to rent the equipment.

X Q. 176. You were going to do it, but you were going to rent the equipment to do it with?

A. The bids were for the rental of the equipment, and the construction was going to be a force account.

* * * * * *

[Trans., p. 534] X Q. 197. What would you say with reference to the false berm, both land-side and river-side, between stations 5146 and 5113, as being additional construction of that item?

A. Yes, sir; it reinforces the foundation of that item.

X Q. 198. It was additional construction, then, wasn't it?

A. It was reinforcement of the foundation that wasn't in the original specifications.

X Q. 199. It increased the quantity of material in that item, didn't it?

[Trans., p. 535] A. The berm that was between stations 5113 and 5123 did increase the quantity of material in the item, but that portion that was south of 5123 wasn't Mr. Walker's work and wasn't a part of his item.

* * * * * * *

X Q. 204. On October 7, did you intend to divide it into two items?

A. No, sir; we had no desire to change the contract at all, and made no attempt to.

* * * * * * *

[Trans., p. 537] X Q. 216. I asked you a question, and I want you to answer me directly, yes or no, if it was your understanding that he was going to do that at the contract price?

A. He said, at the time, that he wasn't satisfied with that order, and I advised him that, under the contract——

* * * * * * *

By Mr LITTLETON:

[Trans., p. 538] X Q. 218. You hadn't given him that order on the 14th, had you?

A. I did give him the order on the 14th; yes.

X Q. 219. What was your order then?

A. My order was substantially what you find in this letter here.

X Q. 220. That was your order?

A. Yes; that was a verbal order to proceed.

* * * * * * *

57 [Trans., p. 539] X Q. 226. When he left your office on the 13th what was the conclusion reached at your conference at that time?

A. There was none reached.

* * * * * * *

X Q. 231. Did you tell him that he would do it at the contract price at that time?

A. Yes, sir.

X Q. 232. What did he say then?

A. He said he wouldn't do it.

* * * * * * *

[Trans., p. 545] X Q. 273. Didn't he tell you there wasn't sufficient suitable material in there to complete that levee?

A. I don't recall. He probably did object to it. I mean I don't recall the conversation.

* * * * *

By Mr. LITTLETON:

X Q. 276. You say he didn't advance that reason. Did you say that he didn't advance that reason?

A. I don't remember that he advanced that reason as one of his reasons for not wanting to do the work; no sir. I don't think he knew at the time, and I don't think anybody knew. That was one of the reasons we had it checked, to be sure there was sufficient dirt there.

* * * * *

[Trans., p. 546] X Q. 278. There are certain conditions when that dirt isn't suitable?

A. Yes, sir.

X Q 279. That is, when the water rises?

A. Yes, sir; I mean sufficient dirt above the water table, with a margin of safety between the water table and the place where the bucket would work.

X Q. 280. You couldn't take the dirt down to the water table, could you?

A. No, sir; we allow a certain amount of factor of safety there.

* * * * *

[Trans., p. 547] X Q. 284. Didn't the contractor, on several occasions, ask you for permission to reach out and get additional material beyond his right-of-way, because the material next to the levee wasn't suitable?

A. I don't recall any such request.

* * * * *

X Q. 286. I show you a letter, signed by Major Larkin on July 12, 1932, and ask you if that is not the permission of the contractor to take material outside of his right-of-way, because the material in the right-of-way wasn't suitable for levee construction?

The COMMISSIONER. Is that exhibit in the case?

Mr. LITTLETON. It is not yet, but I was asking him generally about it.

[Trans., p. 548.]

The WITNESS. Yes, sir; that is permission to get dirt from outside the original right-of-way limits. On a section of this——

By Mr. LITTLETON:

X Q. 287. Yes; but that was the practice along there. You did find, at times, the water table made the material immediately in front of the construction unsuitable for levee work?

A. Yes, sir.

* * * * *

58 By Mr. LITTLETON:

[Trans., p. 573] X Q. 427. Were you on the job when that false berm between 5146 and 5123, on the river side, was constructed?

A. Yes, sir.

X Q. 428. Did you find, in the contractor's right-of-way limits between those stations, suitable or sufficient suitable material to complete the construction of the false berm along those stations?

Mr. STERN. I object to that as immaterial, as having nothing to do with the cause of action.

The COMMISSIONER. Objection overruled.

Mr. LITTLETON. I am just checking up, your Honor, on these estimates, the estimates that were made at the same time.

The WITNESS. We had to go outside of the right-of-way limits to get suitable material to build the berm.

* * * * *

By Mr. LITTLETON:

[Trans., p. 577] X Q. 447. The contractor was pretty much the judge of the kind and suitability of the material that he wanted to put into the levee construction, wasn't he?

A. He was required to put in serviceable material, and if he didn't put in material that was serviceable, that we didn't think was serviceable, it was his responsibility, if it slipped.

* * * * *

By Mr. LITTLETON:

[Trans., p. 581] R. X Q. 466. When you hit the water table, it is pretty hard to drain it, isn't it?

A. There isn't much you can do about it, you can't dry it out. You can dig pits, and that has been done, but that is difficult.

* * * * *

WASHINGTON, D. C.

[Trans., p. 589] Tuesday, January 9, 1940, 10:00 o'clock A. M. Testimony for plaintiff in rebuttal. The parties met, pursuant to notice of the Commissioner, at the time above stated, in the Hearing Room, Court of Claims Building, Washington, D. C. Present: Hon. E. W. Hobbs, Commissioner; Robert A. Littleton, Esq., Counsel for Plaintiff; and William Stern, II, Esq., Counsel for Defendant. Pursuant to the order of reference by the Honorable, The United States Court of Claims, in the above-entitled cause, testimony on behalf of the plaintiff was taken as follows:

KEITH WASSON, a witness produced on behalf of the plaintiff, having been previously sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

By Mr. LITTLETON:

[Trans., p. 590] Q. 1. Mr. Wasson, have you examined defendant's exhibit H that was filed with the testimony of Mr. Register, the Government Inspector in charge of the Lake Lee construction between stations 5113 and 5126?

A. Yes, sir.

* * * * *

By Mr. LITTLETON:

Q. 4. From your experience there in working with that material, what do you say with reference to the correctness of that estimate?

59 A. As I remember, elevation 107 would be about 12 feet below the natural surface of the ground. We couldn't go that deep.

Q. 5. How deep could you go there and obtain suitable material for levee construction and berm construction?

[Trans., p. 591] A. The material below about 3 feet wasn't suitable, wasn't good material.

Q. 6. What was its condition; what was the matter with it, if anything?

A. The material was too wet and it was of a silthy-blue mud nature.

* * * * *

By Mr. LITTLETON:

[Trans., p. 597] Q. 30. Did the use of your Monaghan dragline add any cost to the handling of material for the completion of the levee and the river-side berm, by having to swing the material around in front of the dragline or in front of your tower machine?

A. Yes; the material we put in with the dragline had to be rehandled with the tower machine, making a double operation.

* * * * *

By Mr. LITTLETON:

[Trans., p. 600] Q. 42. Was anything said by him, at that time, about letting bids for the work of constructing the river-side berm between stations 5123 and 5113?

A. Yes; what Lieutenant Pence wanted us to do was to drop out of these stations between 5113 and 5123, because we had the tower-machine and the levee was soft and wet and [Trans., p. 601] bad and it would be a difficult job for hauling outfit, and they would haul in this river-side berm with rented equipment of their own, if they could get in there in time to do it before we were ready to top out. What Lieutenant Pence was afraid of was that he could not get his own forces in and haul that berm in and

get it in in time to let us top out, when we had our own work done.

Q. 43. You had a limit on your contract there, did you, when you would complete?

A. We only had so much work on that contract left to do, and then we were going to move over to another job; and if he had put in the river-side berm with his own forces he was afraid he would have to delay us there, to let us top the levee out.

* * * * *

By Mr. STERN:

[Trans., p. 614] X Q. 114. You say you told Lieutenant Pence that there wasn't sufficient available material there to build a berm and cap out the levee?

A. There wasn't sufficient suitable material within reach of our tower machine.

* * * * *

[Trans., p. 615] X Q. 118. Now, I want to ask you whether, over the entire area of your borrow pit, to the distance that you were using your tower machine, you did excavate for a distance of 3 feet below the ground surface?

A. How is that question?

(Thereupon the reporter read the pending question.)

60 The WITNESS. No; because there was about 4 stations in there between 5116 to 5119 or 5120, where this pit was already too low to get that material.

By Mr. STERN:

X Q. 119. You mean you had exposed the whole borrow pit area of 4 feet below the natural ground surface, with the exception of, let us say, the blue hole that was in there?

A. Yes; with the exception of about 4 stations where this blue hole ran away out into the pit. That was already below the pit specifications and we couldn't take any material there, at all. The only place we could get dirt there was right in the back of the pit; and then, of course, on each side of the blue hole, we could get material maybe all the way into the levee.

* * * * *

[Trans., p. 628] BEN T. ALEXANDER, a witness produced on behalf of the plaintiff, having been first duly sworn, by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

* * * * *

By Mr. LITTLETON:

[Trans., p. 629] Q. 6. What was your position with the Callahan-Walker Construction Company?

A. I was operator of a tower machine.

* * * * *

[Trans., p. 630] Q. 17. Was it any part of your duty, in operating that machine, to make any observation of the condition of the soil or material in the borrow pit of the contractor, that was used for the construction of that river-side false berm and topping out the levee?

[Trans., p. 631] A. I would say no.

Q. 18. Was it any part of your duty to observe the condtion of that material?

A. Yes; it was my duty to see that we used the right kind of material to put that levee up with.

* * * * *

Q. 22. What was the depth to which you could go from the surface there in getting suitable material?

A. Well, I would say from 2 to 3 feet.

Q. 23. When you went lower than that, what condition would you encounter?

A. Water; you began to strike water.

* * * * *

[Trans., p. 632] Q. 29. Do you remember which stations the old pond was in front of, what stations between stations 5123 and 5113 that you found this old pond?

A. Well, I think it was along about 16, about three stations there to 19, I believe.

[Trans., p. 633] Q. 30. Did the pond extend out a short or long distance from the center line of the levee?

A. It extended about 600 feet out there or 650.

* * * * *

61 Q. 32. What condition did you find the soil to be in, in front of stations 5119 and 5116, where this pond was?

A. That station was all bad; there was no available dirt there, at all.

* * * * *

[Trans., p. 646] MARK C. WALKER, a witness produced on behalf of plaintiff, having been previously duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

By Mr. LITTLETON:

Q. 1. Mr. Walker, in your conferences with Lieutenant Pence on October 13 and 14, 1932, in connection with the work between stations 5113 and 5123, was anything said at that time by you or Lieutenant Pence or Mr. Wasson, with reference to the availability of suitable material in your borrow pit right-of-way between sta-

tions 5113 and 5123, to construct the river-side false berm and complete topping of the levee?

A. Yes; there was a lot of discussion about that.

Q. 2. What was said by you or by Lieutenant Pence or Mr. Wasson?

[Trans., p. 647] A. Well, they were talking about us building the land-side and river-side extra false berm, and we told them we couldn't do that because there wasn't sufficient material.

Q. 3. They wanted you to do that at the contract price?

A. Well, I assume so. We hadn't gotten to the price. We were discussing the shortage of material, at that time. We had already piled up enough dirt to top out the levee by hauling it in, drifting it in. There was a shortage of material and——

Q. 4. Did Lieutenant Pence ask you, as an officer of the contractor, whether the contractor would build those new false berms and top out the levee between those stations?

A. They all knew there was a shortage of material in there to start with. The plans showed that on the original plans, and we had to fill that blue hole, and we hauled some 40,000 yards before we did that, and we had the dragline cast the material from both ways to make as much material available as possible. So when this false berm came up, they knew as well as we did, and we always discussed it, that there wasn't sufficient material to build the false berm, either land side or river side, and it was our contention all of the time that that levee would have stood up; that there was no indication of any subsidence at those stations.

* * * * *

[Trans., p. 648] Q. 12. Lieutenant Pence testified that you didn't make any objection, or the contractor did not make [Trans., p. 649] any objection to building the river-side false berm between stations 5123 and 5113——

62 Mr. STERN. What page is that?

Mr. LITTLETON:

Q. 13. On account of the shortage of the material; is that true?

A. It is very true that we did object.

Q. 14. I say, he said you didn't make any objection on account of the shortage of material?

A. That isn't true; no, sir.

Q. 15. What was the principal basis of your objection to doing that work?

A. The shortage of material. It would require hauling. That was outside of the scope of our equipment and contract.

Q. 16. Did Lieutenant Pence say anything to you at that time about the right of himself or the contracting officer to require you

to increase Item A to the extent of 20 percent of the cubic yardage in that entire item?

A. Yes; we objected to doing the additional work because we thought it was outside of the contract, and because of the shortage of material that had to be hauled, and the subcontractor, who did the hauling, had done our hauling and finished his original contract, and we had no control over it; and they talked, the night of [Trans., p. 650] the 13th—or he talked, the night of the 13th that they might do both the land-side and river-side berms with their equipment, but they would have to rent the equipment and get bids on the rental, and it would require 2 or 3 weeks before they could get an outfit in there; and he told us that he could make us put, if they wanted to, 20 percent of the amount of the item——

* * * * * *

[Trans., p. 656.]

The COMMISSIONER. We will suspend until 2:00 o'clock.

(Thereupon recess was taken in the hearing until 2:00 o'clock p. m.)

MARK C. WALKER resumed the witness stand and testified as follows:

By Mr. LITTLETON:

[Trans., p. 656] Q. 57. In your discussion with Lieutenant Pence on October 13 was any agreement or understanding [Trans., p. 657] reached between you as to what would be done with reference to constructing the river-side and land-side berms between stations 5113 and 5123?

A. He was of the opinion, at that time, that they would build the land-side and river-side false berms, and wanted to know if we would top the balance of the ten stations out with the tower machine, and I told him that we thought they should do all of the work where they stopped us and started us at the other station, and it would become their job. He asked us to come back the following morning, and he would let us know.

* * * * * *

63 Q. 59. Had you had a talk with Major Larkin between your conversation with Pence on the 13th and your going back to him on the 14th?

A. Yes; we talked to Major Larkin and he told us to see Pence the following morning.

Q. 60. Did you go down to Vicksburg to see him?

A. Yes; I went down and talked to him the morning of the 13th, and he told me to go back and see Pence, after I called him up the 13th and he asked me to talk to Pence. That morning, that next morning, I told him that we would not do that work at the contract price.

* * * * * *

[Trans., p. 658] Q. 62. You mean you wouldn't build the false berm, the river-side or land-side false berm?

A. We told him we wouldn't do that work in there at the contract price. It was their job, that was our contention; it was their job.

Q. 63. What was your reason for not building it?

A. Because there wasn't sufficient material there, and it had to be hauled in. However, we did tell him we would do whatever we could within the scope of the tower at the contract price. We tried to cooperate with him then, because he explained that they couldn't get an outfit there quick enough to get all of that levee up, that had subsided, before the high water came, in order to protect the Delta country, and there was danger of flood, because it was getting that time of the year, and we told him we would do whatever we could within the scope of our machine, especially the tower machine.

Q. 64. Now, in your conversation with Pence on the 14th did you reach any agreement as to how that work should be done?

A. No; we told him there was only one way to do it, and that was on the cost-plus basis.

Q. 65. What do you mean?

A. The actual cost plus 15 percent for supervision [Trans., p. 659], etc. We didn't want to make any money. We were trying to and willing to cooperate with him then, but we didn't want to lose any money either, so he said that was the way they had decided to do, and we would have to do it at the contract price, build the false berm, and we told him we wouldn't do it, and we left the office. Later, he wanted to know if that was our decision, and I told him I would let him know in a few minutes. In the meantime, I went out and called Major Larkin, because I didn't think he was telling me the way Major Larkin had told me they wanted to handle it; in fact, I thought he was trying to out-trade us.

Q. 66. In your conversation with Major Larkin on the 13th what was the discussion with reference to pay for that river-side false berm and land-side false berm?

A. Well, on the 14th I called Major Larkin up——

Q. 67. On the 13th you had a talk with Major Larkin, did you not?

A. Well, we didn't know just exactly what they were going to do at that time, and that is the reason he referred me to
64 Pence, because he was closer to our camp than Larkin was.

* * * * * *

Q. 69. Then you came back to Lieutenant Pence on the 14th, and then what was said?

[Trans., p. 660] A. I just stated that. Then I went out and called up Major Larkin, because I thought he was trying to outtrade us; it didn't sound like what Major Larkin had told me, what Pence had told us. He said, yes, that is right, for us to go ahead and do what we could with the tower and turn in a bill for the balance, and then we went ahead and told Pence we were going to proceed with the work.

Q. 70. Now, in keeping the time on the equipment there, did you—in your claim, you claim only for the rental of the equipment that was used, outside of the tower machine?

A. That is right, and we kept the accurate time of each caterpillar and each dragline working, and the Government also put on an extra man to keep the time, or extra men to keep the time. So we were lead into believing it was all understood and we paid no attention to the letter that we got, that it would have to be done at the contract price. Several days later we got a letter from Major Larkin.

* * * * *

The WITNESS. I knew we couldn't do it at the contract price, because experience had told us that we could not.

[Trans., p. 661]

By Mr. LITTLETON:

Q. 72. Would you have lost money on it?

A. Yes; we did lose money on what we hauled in there under the original contract. We paid 16 cents to Mr. Morrow to haul that blue hole and that is more than our contract price, and we knew there was a shortage of dirt to start with and it developed into unusually bad dirt and there was less dirt than there was at first.

* * * * *

By Mr. STERN:

[Trans., p. 673] X Q. 138. But even though he said that, four days later he writes you a letter saying do it at this price, at the contract price. Didn't you think, when you received that letter, in which he said to do this work at the contract price, after he had said, "When you are through, turn in a bill"—didn't you think that was inconsistent with what he had told you?

A. I thought that was just for a matter of record.

X Q. 139. In other words, you knew that Major Larkin was making a record here, that he was ordering you to do it at the contract price?

A. Yes; but I didn't understand we were doing it at the contract price.

* * * * *

[Trans., p. 674]

By Mr. LITTLETON:

R. D. Q. 142. Did they ever tell you they had obtained authority from the head of the department?

A. No.

* * * * * *

[Trans., p. 675] R. D. Q. 142. After October 7, there were changes made in the specifications and the design of the levee from station 5123 on to station 5113?

A. Yes; and down to 5146, they redesigned the levee.

65 R. D. Q. 143. The only written notice that you got of that change, that you ever received, was in this letter of October 18, 1932?

A. Yes, sir.

R. D. Q. 144. Now, that increased the contract price by some 62,000 additional yards, didn't it, for the river-side berm?

A. I believe that is correct.

R. D. Q. 145. There was a change in design?

A. Yes; they redesigned——

[Trans., p. 676] R. D. Q. 146. And the contract price, as that letter states, is more than $500, is it not?

A. Yes.

R. D. Q. 147. Does that letter state that it was by authority of the head of the department?

A. No; it is signed "District Engineer," is all.

R. D. Q. 148. That states there in pursuance of a conference you had, too, doesn't it? It says with reference to "confirming instructions"——

A. "Confirming instructions issued to you by the central area engineer," etc.

R. D. Q. 149. You had no written instructions issued to you by the central area engineer, had you?

A. No, sir.

[Endorsed:] Parts of record requested by plaintiff to be included in transcript.

ROBERT A. LITTLETON,
Robert A. Littleton,
Attorney for plaintiff.

66 *Plaintiff's Exhibit No. 7*

Standard Form No. 23—Approved by the President, Nov. 19, 1926.

W 1106 eng.–1491.

STANDARD GOVERNMENT FORM OF CONTRACT

(Construction)

War Department (Department).
Callahan-Walker Construction Co., (Contractor).
Contract for levee work. Amount, Approximately $560,114.88.
Place, Vicksburg Engineer District.

67 CONTRACT FOR CONSTRUCTION

This contract, entered into this 27th day of August, 1931, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and the Callahan-Walker Construction Co., a corporation organized and existing under the laws of the State of Nebraska, of the city of Omaha, in the State of Nebraska, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for constructing about 3,881,600 cubic yards of earthwork as described in paragraph 39.2 of the specifications hereinafter referred to, for the consideration of fourteen and forty three hundredths cents ($0.1443) per cubic yard, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications, Serial No. 32/30, attached hereto. Map, file No. 53/72, also attached hereto. The work shall be commenced as provided in paragraph 2 of the specifications, and shall be completed as stipulated in paragraph 39.2 of the specifications.

68 I, F. L. Byford, certify that I am the secretary of the corporation named as contractor herein; that M. C. Walker, who signed this contract on behalf of the contractor, was then President and Treasurer of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

F. L. BYFORD, [SEAL].
F. L. Byford.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ... who signed this contract for the ..... had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

.....,
Contracting Officer.

This contract is authorized by the acts of May 15, 1928.

DIRECTIONS FOR PREPARATION OF CONTRACT

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the standard form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations."

3. The blank space of Article I is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it is deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used: "ARTICLE ..... Patents.—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control."

5. Where only one payment is contemplated upon completion of the contract, all except paragraph (*d*) of Article 16, "Payments to Contractor," must be stricken out.

6. If approval of the contract is required before it shall become binding, the following article must be added: "ARTICLE ..... Ap-

proval.—This contract shall be subject to the written approval of ..... and shall not be binding until so approved."

Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

69 8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officer must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The Invitation, Bid, Acceptance, and Instructions to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

70 ARTICLE 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or de-

crease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

ARTICLE 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by re-
71 moving or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies

it, unless otherwise stated in the specificationes; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ARTICLE 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

ARTICLE 8. Superintendence by contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ARTICLE 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor

and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the
72 facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

ARTICLE 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ARTICLE 11. Eight-hour law—Convict labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars

shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE 12. Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ARTICLE 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ARTICLE 14. Officials not to benefit.—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the

contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, 73 however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

ARTICLE 17. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

ARTICLE 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

ARTICLE 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

In witness whereof, the parties hereto have executed this contract as of the day and year first-above written.

THE UNITED STATES OF AMERICA,
By T. B. LARKIN,
T. B. Larkin,
Major, Corps of Engineers,
(Official Title)
District Engineer, Contracting Officer.
CALLAHAN-WALKER CONSTRUCTION CO.,
Contractor.
By [SEAL] M. C. WALKER,
M. C. Walker,
Pres. & Treas.,
(Title)
Omaha, Nebraska,
(Business Address)

Two witnesses:
F. L. BYFORD,
F. L. Byford.
FRED OCHSENBEIN,
Fred Ochsenbein.

74 Address reply to the District Engineer, U. S. Engineer Office, Vicksburg, Miss.

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE,
Vicksburg, Miss., September 21, 1931.

Refer to file No. M. R. 399.

Subject: Return of Performance Bond and Reinsurance Agreement.

To: Callahan-Walker Construction Co., 1200 First National Bank Bldg., Omaha, Nebraska.

GENTLEMEN: There are returned herewith performance bond and reinsurance agreement in duplicate, originally executed to support your contract dated August 27, 1931. New bond and agreement, properly executed, were received in this office on September 14, 1931.

For the District Engineer:
Very truly yours,

F. J. FITZPATRICK,
F. J. Fitzpatrick,
Captain, Corps of Engineers,
Executive Assistant.

Inclosure—Performance Bond and Reinsurance Agreement, in duplicate.

76 Standard Form No. 25—Approved by the President Nov. 19, 1926.

STANDARD GOVERNMENT FORM OF PERFORMANCE BOND

(Construction or Supply)

Know all Men by these Presents, That we, the Callahan-Walker Construction Co., Incorporated in the State of Nebraska, as Principal, and The Home Indemnity Company, incorporated in the State of New York, as Surety (See Instructions 2, 3, 4, and 7), are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of two hundred eighty thousand sixty (280,060) dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated August 27th, 1931, for the construction of levee work on the east bank of the Mississippi River, in Mississippi,

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 27th day of
77 August 1931, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by

its undersigned representative, pursuant to authority of its governing body.

CALLAHAN-WALKER CONSTRUCTION CO.,
1200 First National Bank Bldg.,
Omaha, Nebraska.

[SEAL] By M. C. WALKER,
M. C. Walker,
(Title) *President.*

Attest:

F. L. BYFORD,
F. L. Byford.

THE HOME INDEMNITY COMPANY,
111 John Street,
New York City, New York.

[SEAL] By FRED OCHSENBEIN,
Fred Ochsenbein,
Attorney-in-fact.

Attest:

J. BUBON,
J. Bubon.

The rate of premium on this bond is $10.00 per thousand on contract price.

Total amount of premium charged, $5,601.20.

(The above must be filled in by corporate surety.)

78 Standard Form No. 25—Approved by the President, Nov. 19, 1926.

STANDARD GOVERNMENT FORM OF PERFORMANCE BOND

(Construction or Supply)

Know all Men by these Presents, That we, the Callahan-Walker Construction Co., incorporated in the State of Nebraska, as Principal, and The Home Indemnity Co., incorporated in the State of New York, (See Instructions 2, 3, 4, and 7) as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of two hundred eighty thousand sixty (280,060) dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated August 27th, 1931, for the construction of

levee work on the east bank of the Mississippi River, in Mississippi,

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 27th day of
79 August, 1931, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

CALLAHAN-WALKER CONSTRUCTION CO.,
1200 First National Bank Bldg.,
Omaha, Nebraska.,

By M. C. WALKER,
[SEAL] M. C. Walker,
(Title) *President.*

Attest:
F. L. BYFORD,
F. L. Byford.

THE HOME INDEMNITY CO.,
111 John Street,
New York City, New York.,

By FRED OCHSENBEIN,
[SEAL] Fred Ochsenbein,
Attorney-in-fact.

Attest: J. BUBON,
J. Bubon.

The rate of premium on this bond is $10.00 per thousand on contract price.

Total amount of premium charged, $5,601.15.

(The above must be filled in by corporate surety.)

80 Form 389—Treasury Department, Section Surety Bonds.

REINSURANCE AGREEMENT IN FAVOR OF THE UNITED STATES

This Agreement, made this 29th day of August, 1931, by and between the Home Indemnity Company, a corporation duly incorporated under the laws of the State of New York, having its principal office in the City of New York, and Southern Surety Company of New York, a corporation duly incorporated under the laws of the State of New York, having its principal office in the City of New York,

Witnesseth:

Whereas, on even date herewith, The Home Indemnity Company became bound as surety unto the United States of America in the penal sum of two hundred eighty and 60/100 thousand dollars ($280,060.00) on a bond, wherein Callahan-Walker Construction Co. was principal, for the due and faithful performance according to law of .....; and

Whereas, the said The Home Indemnity Company has applied to the Southern Surety Company of New York to be reinsured and countersecured to the extent of Ninety-three and 354/100 thousand dollars ($93,354), or for whatever amount less than One Hundred Eighty-six and 706/100 thousand dollars ($186,706.00) the said The Home Indemnity Company may become liable to pay under or by virtue of said bond;

Now, therefore, in consideration of the sum of One Thousand Eight Hundred sixty-seven and 08/100 dollars ($1,867.08) paid by the said The Home Indemnity Company to the said Southern Surety Company of New York, the receipt whereof is hereby acknowledged, the said Southern Surety Company of New York in the event of the insolvency of the said The Home Indemnity Company or of its failure to pay any default under said bond equal to or in excess of Ninety-three and 354/100 thousand dollars ($93,354.00), the amount of this reinsurance, hereby covenants and agrees to pay to the United States, the obligee in said bond, the full sum of One Hundred eighty-six and 706/100 thousand dollars ($186,706.00), the amount of this reinsurance, and in case of the failure of the said The Home Indemnity Company to pay to the United States any default for a sum less than One Hundred eighty-six and 706/100 thousand dollars ($186,706.00), the amount of said reinsurance, then the said Southern Surety Company of

New York hereby covenants and agrees to pay to the United States the full amount of such default, or so much thereof as shall not be paid to the United States by the said The Home Indemnity Company; it being the purpose and intent hereof to guarantee and indemnify the United States against loss under said bond of Callahan-Walker Construction Co., as principal, to the extent of One hundred eighty-six and 706/100 thousand dollars ($186,706.00) or for any less sum than One Hundred eighty-six and 706/100 thousand dollars ($186,706.00) that may be owing and unpaid by the said The Home Indemnity Company to the United States;

81 And it is hereby further covenanted and agreed by the said Southern Surety Company of New York that in case of default on said bond for Ninety-three and 354/100 thousand dollars ($93,354.00) or more, the said company may be sued by the United States for said amount of Ninety-three and 354/100 thousand dollars ($93,354.00), or for whatever the amount of the default may be less than Ninety-three and 354/100 thousand dollars ($93,354.00).

In witness whereof, The Home Indemnity Company has caused this agreement to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, and Southern Surety Company has also caused this agreement to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, the day and date first herein written.

THE HOME INDEMNITY COMPANY,

[SEAL] By FRANK T. GILSON.
Frank T. Gilson,
Vice-President.

Attest:

PAUL BROWN,
Paul Brown,
Assistant Secretary.

Attest:

SOUTHERN SURETY COMPANY OF NEW YORK.

[SEAL] By W. D. DEAN,
W. D. Dean,
Vice President.

Attest:

PAUL BROWN,
Paul Brown,
Assistant Secretary.

NOTE.—This form should be used in cases where it is desired to cover the excess of a company's qualifying power, by reinsurance instead of cosuretyship, on bonds running to the United States.

82 Form 389—Treasury Department, Section Surety Bonds.

REINSURANCE AGREEMENT IN FAVOR OF THE UNITED STATES

This Agreement, made this 29th day of August 1931, by and between The Home Indemnity Co., a corporation duly incorporated under the laws of the State of New York, having its principal office in the City of New York, and Southern Surety Company of New York, a corporation duly incorporated under the laws of the State of New York, having its principal office in the City of New York,

Witnesseth:

Whereas, on even date herewith, The Home Indemnity Co. became bound as surety unto the United States of America in the penal sum of Two hundred Eighty thousand sixty dollars ($280,060.00) on a bond, wherein Callahan-Walker Construction Co. was principal, for the due and faithful performance according to law of contract dated August 27, 1931, symbol No. W1106 eng. 1491 for the construction of levee work on the east bank of the Mississippi River in Mississippi, and

Whereas, the said The Home Indemnity Co. has applied to the Southern Surety Company of New York to be reinsured and countersecured to the extent of Ninety-three thousand three hundred fifty-four dollars ($93,354.00), or for whatever amount (less than one hundred eighty-six thousand seven hundred six dollars ($186,706.00) the said The Home Indemnity Co. may become liable to pay under or by virtue of said bond;

Now, therefore, in consideration of the sum of One Thousand Eight Hundred sixty-seven and 08/100 dollars ($1,867.08) paid by the said The Home Indemnity Co. to the said Southern Surety Company of New York, the receipt whereof is hereby acknowledged, the said Southern Surety Company of New York in the event of the insolvency of the said The Home Indemnity Co. or of its failure to pay any default under said bond equal to or in excess of Ninety-three thousand three hundred fifty-four dollars ($93,354.00), the amount of this reinsurance, hereby covenants and agrees to pay to the United States, the obligee in said bond, the full sum of One Hundred eight-six and 706/100 thousand dollars ($186,706.00), the amount of this reinsurance, and in case of the failure of the said The Home Indemnity Company to pay to the United States any default for a sum less than One Hundred eighty-six and 706/100 thousand dollars ($186,706.00), the amount of said reinsurance, then the said Southern Surety Company of New York hereby covenants and agrees to pay to the United States the full amount of such default, or so much thereof as shall not be paid to the United States by the said The Home Indemnity Company; it

being the purpose and intent hereof to guarantee and indemnify the United States against loss under said bond of Callahan-Walker Construction Co., as principal, to the extent of One hundred eighty-six and 706/100 thousand dollars ($186,706.00), or for any less sum than One hundred eighty-six and 706/100 thousand dollars ($186,706.00) that may be owing and unpaid by the said The Home Indemnity Company to the United States;

83 And it is hereby further covenanted and agreed by the said Southern Surety Company of New York that in case of default on said bond for Ninety-three and 354/100 thousand dollars ($93,354.00) or more, the said company may be sued by the United States for said amount of Ninety-three and 354/100 thousand dollars ($93,354.00), or for whatever the amount of the default may be less than Ninety-three and 354/100 thousand dollars ($93,354.00).

In witness whereof, The Home Indemnity Company has caused this agreement to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, and Southern Surety Company has also caused this agreement to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, the day and date first herein written.

THE HOME INDEMNITY COMPANY,
[SEAL] By FRANK T. GILSON,
Frank T. Gilson,
Vice-President.
Attest:
PAUL BROWN,
Paul Brown,
Assistant Secretary.
SOUTHERN SURETY COMPANY OF NEW YORK,
[SEAL] By W. D. DEAN,
W. D. Dean,
Vice-President.
Attest:
PAUL BROWN,
Paul Brown,
Assistant Secretary.

NOTE.—This form should be used in cases where it is desired to cover the excess of a company's qualifying power, by reinsurance instead of cosuretyship, on bonds running to the United States.

84 Know all men by these presents, that the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having its principal offices in the City of New York, hath made, constituted and appointed,

and does by these presents make and constitute and appoint J. Parchman Henry, of Jackson and State of Mississippi, its true and lawful Attorney-in-fact, with full power and authority hereby conferred in its name, place, and stead, to sign, execute, and acknowledge and deliver any and all bonds of suretyship, undertakings, and other writings obligatory in the nature of a bond of suretyship or undertaking in amounts not exceeding One Hundred Thousand ($100,000) Dollars each, and to bind the National Surety Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said Attorney pursuant to the power herein given. This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the Third day of October, 1922.

"ARTICLE XII. Resident Officers and Attorneys-in-Fact.

"SECTION 1. The Chairman, Vice-Chairman, President, or any Vice-President may from time to time, appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for, and on behalf of the Company, and either the Chairman, Vice-Chairman, President or any other Vice-President, the Board of Directors, or the Executive Committee, may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact, and revoke the power and authority given them.

"SECTION 4. Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute for and in the name and on behalf of, the Company, any and all bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance or conditional undertaking, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Company as if signed by the Chairman, Vice-Chairman or President and sealed and attested by the Secretary.

"SECTION 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any By-Law contained in Articles VI, XII, and XIII of the By-Laws of the Company."

In witness whereof, the National Surety Company has caused these presents to be signed by its Vice-President and its corporate

seal to be hereto affixed, duly attested by its Assistant Secretary, this 17th day of March, A. D. 1931.

[SEAL] NATIONAL SURETY COMPANY,
By RANULPH KINGSLEY, *Vice President.*
Attest: S. A. ROMOLO, *Assistant Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this 17th day of March, A. D. 1931, before me personally came Ranulph Kingley to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL] M. M. MILLER,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

I, H. Hussenetter, Resident Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said National Surety Company, which is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 11th day of September A. D. 1931.

H. HUSSENETTER,
Resident Assistant Secretary.

86 *Plaintiff's exhibit No. 2*

Serial No. 32/30.

Engineer Department, U. S. Army

STANDARD SPECIFICATIONS FOR LEVEE WORK

Appropriation: Flood Control, Mississippi River and Tributaries.

1. Work to be done: (For more detailed description see paragraph 39.)

Constructing approximately 19,081,700 cubic yards of earthwork on the east and west banks of the Mississippi River in

Mississippi, Arkansas, and Louisiana, and approximately 140,000 cubic yards of earth work on the south bank of the Arkansas River in Arkansas.

88 2. Commencement, prosecution, and completion.—The contractor will be required to commence work under the contract within 20 calendar days after the date of receipt of notice to proceed and to complete it within the time fixed for completion in paragraph 39 of these specifications.

3. Liquidated damages.—For each item of work as listed in paragraph 39 hereof, liquidated damages for delay will be at the rate of $20.00 per day for each and every calendar day of delay beyond the time fixed for its completion.

4. Sundays, holidays.—No work shall be done on Sundays or on days declared by Congress as holidays for per diem employees of the United States except with the written consent of the contracting officer.

5. Eight-hour laws.—The attention of bidders is called to the fact that the eight-hour laws are not applicable to the work described in paragraphs 1 and 39 of these specifications.

6. Patents.—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

7. Payments.—(a) For work under straight contracts.—Payments will be made on monthly estimates of net yardage in place; provided that only 75 per cent of the unit price will be allowed for material in fill not completed to grade and section; and provided further that no estimate on such incomplete fill will be made on less than 20 per cent of the material comprised in the specified section. This limits estimates on any section to five. A percentage of 10 per cent will be reserved from each payment until the work is fully completed; except that the contracting officer, at any time after 50 per cent of the work in an item shown in paragraph 39 hereof as constituting a unit of the contract has been completed, if he finds that satisfactory progress is being made, may make any of the remaining payments in full upon work under said item that has been completed to grade and section.

When all the requirements of the contract and these specifications have been fully completed to the satisfaction of the contracting officer the work will be accepted and final payment made. (See paragraph 38.) Should two or more items of work be awarded to one bidder, one contract will be entered into, but pay-

ment of the retained percentages will be made upon completion of each item of work as listed in the form of bid.

(b) For work under continuing contracts.—The river and harbor act approved September 22, 1922, contains the following provisions:

"That any work of improvement herein adopted, and any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing contracts."

The Flood Control Act for the Mississippi River and its tributaries approved May 15, 1928, contains the following provisions:

"That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Number 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: The sum of $325,000,000 is hereby authorized to be appropriated for this purpose."

Of the total amount therein provided for this project $_____ has been appropriated. Of this amount a sum sufficient to provide for the construction specified for the fiscal year beginning July 1, 193__, on each item of work outlined in paragraph 39 hereof has been allotted and will be reserved for payments in connection therewith. It is expected that Congress, in accordance with the provisions of the act quoted in this paragraph will make additional appropriations before available funds are exhausted, but as to this it must be distinctly understood and agreed that the United States is in no case to be made liable for damages in connection with this contract on account of delay in payments on same due to a lack of available funds. Should it become apparent that the available funds will be exhausted before the completion of the contract, the contracting officer will give 30 days written notice to the contractor that work may be suspended; but, if the contractor so elects, he may continue work under the conditions and restrictions of the specifications, after the time set by such notice, so long as there are funds for inspection and superintendence, with the understanding, however, that no payment will be made for such work until additional funds shall have been provided in sufficient amount. When funds again become available, the contractor will be notified accordingly. Should pay-
89 ment be thus suspended on account of failure of Congress to provide additional funds to meet the rate of progress

required by these specifications, additional time for completion will be allowed equal to the period during which payment is so suspended, as determined by the dates specified in the notices above described.

So long as funds are available, payments will be made on monthly estimates of net yardage in place; provided that only 75 per cent of the unit price will be allowed for material in fill not completed to grade and section; and provided further that no estimate on such incomplete fill will be made on less than 20 pe. cent of the material comprised in the specified section. This limits estimates on any section to five. A percentage of 10 per cent will be reserved from each payment until the work is fully completed; except that the contracting officer, at any time after 50 per cent of the work in an item shown in paragraph 39 hereof as constituting a unit of the contract has been completed, if he finds that satisfactory progress is being made, may make any of the remaining payments in full upon work under said item that has been completed to grade and section.

When all the requirements of the contract and these specifications have been fully completed to the satisfaction of the contracting officer the work will be accepted and final payment made. (See paragraph 38.) Should two or more items of work be awarded to one bidder, one contract will be entered into, but payment of the retained percentages will be made upon the completion of each item of work as listed in the form of bid. In no case will payments be made for any work performed unless and until funds therefor have been allotted and made available.

Should payment be discontinued owing to exhaustion of available funds, 95 per cent of the total amount retained on fully completed work will be paid to the contractor.

Should Congress fail to provide additional funds during its regular session as expected, the contract may be terminated and considered to be completed, at the option of the contractor, without prejudice to him, at any time not later than 30 days after payments are discontinued, or if payments have been previously discontinued, not later than 30 days after the passage of the act which would ordinarily carry an appropriation for continuing the work, or after the adjournment of Congress without passing such act.

8. Award of contract.—The right is reserved to award all the work covered by these specifications to one bidder, or to award items of work as listed in paragraph No. 39 separately or in combinations to two or more bidders, or to reject any or all bids, as may be for the best interest of the United States. A bid or bids may be rejected on the ground that the bidder is lacking in the

necessary capital, equipment, resources, and/or experience, that he is obligated for the performance of as much work as he will probably be able to perform during the period contemplated by these specifications, or that he was injustifiably dilatory, inattentive and/or negligent in the performance of, or has unjustifiably defaulted on past work for the Government, or for other causes.

9. Acceptance of work.—Continuous lengths of levee of 500 linear feet or more will be accepted by the contracting officer when fully and completely finished except timber felling and the sodding or seeding. The intention of this paragraph is that in case of damage or destruction through no fault of the contractor of such lengths as have been accepted, such loss falls upon the United States and not upon the contractor. Portions of levee upon which payments have been made, but which have not been accepted as herein provided shall, if damaged or destroyed, be repaired or replaced by the contractor at his own expense. Retained percentage upon accepted work will not be paid to the contractor until the satisfactory completion and final acceptance as provided in paragraph 7.

10. Price per cubic yard.—The price per cubic yard named in this contract is understood to include all costs of clearing and preparation of foundation, grubbing, dressing and sodding, fencing, drainage, timber felling, and removal of debris. (See paragraphs 20, 21, 30, 32, 33, 36 and 38.)

11. Bids.—Bidders are invited to bid on all of the work advertised, but each bidder must state in his bid the maximum number of cubic yards which he is willing to undertake. If he proves to be the lowest bidder on a greater number of cubic yards, such of the work as may be most advantageous to the United States, not to exceed the number of cubic yards specified by the bidder in his bid, may be awarded to him, and for the remaining work the bid of the next lowest bidder shall be deemed the lowest bid received. Bids must be made upon the Form hereto attached and subject to its provisions.

12. Quantities.—The quantities given are approximate only, and may be increased or diminished by not more than 20 per cent. This variation will apply to each item individually as listed in paragraph 39.

13. Right of way and material.—This agreement is made with the understanding that the right of way and earth for constructing the levee will be furnished without cost to the contrac-
90 tor, except as provided in paragraph 22 (b). Days upon which work is prevented by failure to provide necessary right of way will not be counted against the contractor as delay in completion of contract, nor in computing the time stipulated

in paragraph 2 hereof for commencement of work: but no claim is to be made by the contractor for damage or expense occasioned by delay or failure in securing right of way. In event of failure to obtain right of way for all or any portion of the line by the time construction has progressed thereto, the contracting officer shall have the right to omit work on such line or portion of the line.

14. Modification of specifications.—The right is reserved to make such changes in the work contemplated under these specifications as may be necessary or expedient to carry out the intent of the contract or to meet conditions not now anticipated; but no such modification shall be made the basis of a claim for extra compensation, except as provided in the regular form of contract to be entered into.

15. Inspection.—Proper inspection will be maintained on the work to make the necessary measurements and to insure compliance with the terms of the contract and the orders of the contracting officer. No instructions of an inspector or lack thereof will at any time relieve the contractor from the responsibility of complying fully with all the requirements of the contract. In case of difference arising between the inspector and the contractor or his agents, appeal may be made to the contracting officer. Inspectors are not authorized to waive or alter in any respect any of the terms or requirements of the contract, nor to make additional requirements, nor to grant extensions of time limit or delays, nor to waive forfeitures. The contractor shall not be entitled to payment for any improper work accepted or allowed by an inspector.

16. Accommodations for United States employees.—When required by the contracting officer, the contractor must provide lodging and subsistence for the Government employees required to remain on the work, of a quality satisfactory to the contracting officer, for which the contractor will be paid by the United States at the rate of $15.00 per month for each Government employee lodged and $25.00 per month for each Government employee subsisted.

17. Order of work.—The contracting officer shall have power to designate the exact localities at which the work shall be prosecuted; also the proportion of the force that shall be worked at any designated locality; and the time when sodding and other incidental work shall be done.

18. Location.—The center line of the levee will be staked out by an agent of the United States. The right is reserved to make such changes in the location of the line as may be found necessary before the completion of the work, but if it becomes neces-

sary, through no fault of the contractor, to abandon any line of location on which work has been done, payment for yardage placed will be made at the contract rates. Notes will be furnished to the contractor, giving in detail all information as to grades, cross sections, and dimensions which may be necessary.

19. Net cross section.—Unless otherwise specified in paragraph 39 hereof, levees shall be constructed to the following net dimensions:

(a) Levees below Cape Girardeau, Mo., and Thebes, Ill.

Section	Crown (feet)	Riverside slope	Land-side slope to contain seepage line of	Governing material
A	10	1 on 3	1 on 6	75% or more buckshot.
B	10	1 on 3½	1 on 6½	Loam.
C	12	1 on 5	1 on 8	75% or more of sand.

The land-side slope of levees shall extend in a straight line from the crown elevation to a point where the seepage line intersects the surface of the ground.

NOTE.—The seepage line springs from the river-side slope, at the elevation of the assumed maximum flow line. In the cases of protection levees not a part of the Mississippi or Atchafalaya River systems, the term "land-side" as used in these specifications is to be interpreted as referring to the side facing the area being protected.

(b) Levees above Cape Girardeau, Mo., and Thebes, Ill.: Crown to be 8 feet wide—reduced to 6 feet above mouth of Missouri River; river-side slope to be 1 on 3; and land-side slope to be 1 on 3 to intersection with top of banquette, which shall be from 5 to 8 feet below the levee crown, and shall have the following dimensions: top to be 30 feet wide for levees from 13 to 16 feet high, and 40 feet wide for levees exceeding 16 feet in height; top to have slope of 1 on 10 away from the levee; and rear slope to be 1 on 4 to intersection with natural ground. No banquette will be required on levees less than 13 feet high, in which case land-side slope shall be 1 on 3 to natural ground surface.

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(c) The work shall conform to the maps, profiles, typical cross sections, and/or other drawings described in paragraph 39 hereof, which form a part of these specifications and which are filed at the offices designated in said paragraph. Where the dimensions given for levee cross section in paragraph 39 hereof differ from those prescribed above, the requirements of paragraph 39 govern.

20. Preparation of foundation.—The entire foundation together with strips 5 feet wide outside and contiguous to the slope line on each side shall be prepared in the following manner: all trees either large or small shall be cut down and removed or destroyed, together with all logs, brush, brick, and debris of every description; then the foundation together with the 5-foot strips shall be thoroughly grubbed by the removal of all stumps, roots, buried logs, and other matter, perishable or otherwise that would be objectionable in the foundation of a levee: then the surface between the slope stakes shall be thoroughly broken and turned to a depth of 6 inches. In the construction of new levees an inspection ditch not less than six feet wide at top, nor less than 4 feet wide at the bottom and 6 feet deep shall be cut in such location as directed by the contracting officer. After inspection and approval, the inspection ditch and all other excavations covered by this paragraph must be filled in with approved well-compacted material. For enlargement work, both the natural surface of the ground and the surface of the old levee to be occupied by the new work, shall be prepared as above prescribed. All of the foregoing work shall be completed, to the entire satisfaction of the contracting officer, at least 200 feet in advance of the embankment construction. The inspection ditch will be paid for only on the basis of its refill and the rate will be the same per cubic yard as in the case of the embankment and no payment will be made for its excavation as such. Payment will be made for refill of inspection ditch to cover an average width of 5 feet and depth of 6 feet.

21. Grubbing.—In grubbing out buried logs, stumps, or other objectionable matter, all tap roots and lateral roots or other projections over 1½ inches in diameter must be removed. If necessary, in order to comply with this requirement the grubbing will have to be done to 6 feet below the natural surface of the ground; if at that depth the end of the stump or root has not been reached, it may be cut off. Should the contractor so elect, he may use a stump puller to do the grubbing, provided all roots or stumps over 1½ inches in diameter that break off be grubbed out by other methods. The refilling of holes caused by grubbing will be paid for at the contract price per cubic yard, but the excavations involved will not be paid for, except for work lying outside the line of slope stakes, in which case both excavation and refill will be paid for at the contract price per cubic yard for fill.

22 (a). Embankment.—Unless otherwise specifically directed by the contracting officer in writing, the embankment shall be started full out to the slope stakes and be carried regularly up to the gross fill. In the cases of wagons carrying 5 cubic yards or

more and drawn by not less than 10-ton tractors, the fill shall be deposited in layers not exceeding 5 feet in thickness. In the cases of lighter equipment such as scrapers or horse drawn wagons, the fill shall be deposited in layers not exceeding 3 feet in thickness. Where the work is performed by machines, the requirement of layer construction may be omitted and the work carried continuously to gross fill. If portions of the prepared right of way or uncompleted levee be unduly compacted from any cause whatever, before depositing any material on such surfaces they must again be thoroughly broken up as specified in paragraph 20. Clean earth, free from all foreign matter, shall be used in constructing the embankment. No earth which sloughs or which shows tendency to slough shall be placed in the embankment, except when placed hydraulically under paragraph 22 (b).

(b) Hydraulic Methods.—A contractor proposing to do the work hydraulically will be required to comply with the following:

In placing the material hydraulically slopes shall be made continuous and away from the existing levee on enlargement work, or away from the center line on new levee.

Unless otherwise authorized in writing by the contracting officer, free outlets for waste water shall be provided at intervals of not more than 1,000 feet for 12-inch dredges or smaller, 1,500 feet for 13-inch to 16-inch dredges; and 2,000 feet for dredges over 16 inches. No obstruction to free flow will be permitted in these outlets or at any points in the levee embankment, except that a transverse retaining dike shall be constructed immediately below each outlet; and shall not be breached until the end of the discharge pipe has approached the retaining dike to within 250 feet in the case of 12-inch dredge or small; 375 feet in the case of 13-inch to 16-inch dredges; or 500 feet in the case of dredges over 16 inches.

92 The contractor shall take necessary precautions to prevent damage from waste water or other causes, and shall hold the United States harmless against any and all claims for damage occasioned by his operations.

Preparation of foundation as required in paragraph 20 shall be kept far enough in advance of construction to permit thorough inspection prior to flooding. When fill is deposited in old pits for subsequent rehandling, the pits shall, prior to flooding, be cleared of all trees, logs, driftwood, and debris to outer limits of reexcavation.

The contractor may, at his option, utilize pits other than those furnished by the United States, provided he obtains right-of-way

thereto and property rights to the material therein, and that the location and dimensions of pits, and the character of material therein as indicated by borings submitted by the contractor, be approved by the contracting officer. (See paragraph 25.)

Should the material encountered in pits other than those provided by the United States require the use of a levee section larger than that estimated in the specifications, the larger section must be built without added compensation, or the pits originally designated by the United States must be used. The additional yardage so required will not be considered as forming a part of the allowable excess under paragraph 12.

No payment will be made for material wasted by reason of the above requirements pertaining to hydraulic work.

Bidders proposing to do any work by hydraulic method shall submit to the contracting officer for approval sketches and description of the plan proposed to be followed and shall indicate provisions for drainage. The plan shall include location and depth of borrow pits, if other than those indicated herewith, with borings of same. All of these plans when approved by the contracting officer will become a part of the contract, if contract is made. Approval of location and depth of such proposed pits shall not relieve the contractor from the obligation to furnish satisfactory material nor in any way commit the United States to acceptance of unsatisfactory material or to responsibility for the character, quantity or procurability of material from pits whose location is thus approved but which are not furnished by the United States.

Should the hydraulic construction result in the separation and elimination of any ingredients of the soil as originally found in the pits to such a degree as to change its classification under paragraph 19 hereof to one requiring a larger levee section than that prescribed for the material as found in the pits, and estimated in the specifications, the larger section shall be built without additional cost to the United States. The additional yardage so required will not be considered as forming a part of the allowable excess under paragraph 12.

23. Frozen material.—No earth shall be placed upon a frozen surface, nor shall frozen earth, snow, or ice be placed in the levee. In cases of emergency the contracting officer may require the wasting of frozen material in order that construction may proceed, in which case such material wasted by written order of the contracting officer or his representative, will be paid for at the contract price per cubic yard.

24. Disposition of objectionable material.—When the borrow pits, or the ground to be occupied by the levee, contains soil which is unfit to be put into or remain under the levee, the contractor

will be required to remove the same and dispose of it as directed by the contracting officer. If such material removed from the ground to be occupied by the levee or removed from the borrow pits furnished by the United States is wasted, the contractor will be paid for it at the contract price per cubic yard.

25. Borrow pits.—General.—No earth shall be procured from the land side of the levees unless specifically provided for in paragraph 39. The location of borrow pits, whether on river side or land side of the levee, will be designated in paragraph 39 for each section of work advertised. When shown on maps or profiles submitted to bidders that earth cannot be obtained opposite stations it must be hauled from places designated without extra compensation. In determining the width of berm and the pit depths and slopes, the natural surface of the ground at the site of the work shall be used instead of the surface of the old borrow pits, and such natural surface elevation shall be determined as carefully as practicable. On enlargement work no material shall be taken from the old pits without special permission from the contracting officer. With such permission, the old pits that are not already down to the specified limits below the original natural surface of the ground may be deepened accordingly, but in any case the material must be excavated and removed in such a manner as will afford thorough drainage to the back of the pit and disfigure the land as little as possible. Any excavation below the specified borrow pit slopes constitutes a violation of the these specifications and shall be immediately replaced. Unless otherwise prescribed in paragraph 39 hereof, the following provisions will govern the excavation of borrow pits:

For levees below Red River.—No material shall be obtained within 40 feet of the base of the levee on the river side, or within 80 feet on the land side. The side slope of the pit next to the embankment shall not be steeper than 1 on 2 down to a depth of 3 feet; from that point the outward slope of the pit shall not be steeper than 1 on 10 when on the river side of the levee, and 1 on 100 when on the land side.

93 For levees between the Red and Missouri Rivers.—No material shall be obtained within 40 feet of the base of the levee on the river side nor within 100 feet on the land side. The side slope of the pit next to the embankment shall not be steeper than 1 on 2 down to a depth of 3 feet; from that point the outward slope of the pit shall not be steeper than 1 on 50 when on the river side of the levee, and 1 on 100 when on the land side.

For levees above the Missouri River.—No material shall be obtained within 20 feet of the base of the levee on the river side, or within 100 feet on the land side. The side slope of the pit next to the embankment shall not be steeper than 1 on 3 down to a

depth of 7 feet; from that point the outward slope of the pit shall not be steeper than 1 on 50 when on the river side of the levee, and 1 on 100 when on the land side.

26. Traverses.—Traverses at least 14 feet on top with side slopes of 1 on 2 shall be left across the river side borrow pits as shown on the drawing or designated in paragraph 39 hereof. Where traverses are left the contractor shall cut a waterway through at the back of the pit in such manner as will afford good continuous drainage.

27. Shrinkage.—The allowance for settling or shrinkage of fill will be 8 per cent of the net fill for hydraulic dredge work, 12 per cent for construction in layers of less than 1½ feet thickness by haul-in equipment drawn by 10-ton or heavier tractors, 15 per cent for other scraper work, tractor and wagon work, or animal and wagon work, and 25 per cent for other methods including dragline and other machine scrapers regardless of the material used. The allowance for shrinkage or settling must be so disposed on top and slopes as to give the required width of crown, and to fill out the slopes so as to make plane surfaces from edge of crown to base of levee after shrinage has practically ceased. No embankment that is not carried up as above specified will be paid for. Payment will be made for contents of the levee, as computed to the net grade and section only.

28. Settlement of foundation.—Should the contractor desire to claim payment for the placing of any additional yardage that may be made necessary by settlement of foundation during construction, he must apply to the contracting officer for instructions regarding the erection of structures for the determination thereof in advance of any work on sections on which such payment may be made; and he must erect at his own expense prior to any work thereon, and maintain thereafter, such structures as may then be approved by the contracting officer. Should these requirements be fulfilled, the contractor will be paid, at the same rate as for the other embankment, for such additional yardage as may have been required by reason of such settlement of foundation.

Except as provided for in the sub-paragraph immediately following, the contractor shall receive no compensation for any additional yardage required by reason of settlement of foundation unless the procedure above prescribed and the instructions of the contracting officer with regard to erection of structures shall have been strictly complied with.

In clearly established cases of settlement of foundation at such location or of such character or magnitude as to render impracticable the determination of additional yardage by measurement in place, the levee throughout the zone of such settlement will be paid for, upon the basis of borrow pit measurements, with

deduction for the specified shrinkage allowance. (See paragraph 27.)

Where, in any section and before the levee has been completed to grade and section, settlement of foundation develops to such extent as to make it inadvisable in the opinion of the contracting officer to continue to add material, and advisable in his opinion to postpone to a considerably later date all attempts to complete this portion of the levee to grade and section, he shall have the right to omit further work on this section, and to accept it as completed, after it has been dressed and sodded. (See paragraph 30.)

29. Slides.—In case of the sliding of any part of the levee during its construction, or after its completion, but prior to its acceptance, as defined in paragraph 9 of these specifications, and in case such sliding is caused through fault of the contractor, the contractor shall cut out and remove the slide from the levee at his own expense, and shall then rebuild this portion of the levee to the required section, without additional cost to the United States. In case the slide is due to no fault of the contractor, the extra work of cutting out and rebuilding that portion of the levee affected by the slide, shall be done by the contractor at the expense of the United States. The yardage removed and replaced shall both be paid for at the unit price bid by the contractor for levee construction under this contract.

30. Sodding.—After the embankment is built to the proper height and dimensions it shall be smoothly dressed to the proper slopes and the entire surface shall be planted with living sods of Bermuda or some other acceptable grass which will best meet the climatic conditions. The sods shall be not less than 4 inches square, shall be placed not more than 18 inches center to center, and shall be covered with 1 or 2 inches of earth as directed. The contracting officer may require seeding of slopes in lieu of sodding. The contractor shall keep the weeds cut on the levee after sodding or seeding, until final acceptance of the contract or of items thereof.

94 31. Road crossings.—Road crossings shall be constructed of such dimensions as may be designated by the contracting officer, and at such points as are indicated in paragraph 39 hereof or in the plans. They will be paid for at the same price per cubic yard for the net cubic contents as for the levee itself.

32. Roads and fences.—Wherever the location of the levee is traversed by public or private roads, they must be kept open and in safe condition for use during the progress of the work. Where existing fences are disturbed, the contractor shall erect and keep up such temporary fences as may be necessary for the preserva-

tion of the crops and protection of property. The contractor will be held responsible for all damages caused by his failure to thus maintain such roads and fences, and unless otherwise directed by the contracting officer, he shall, upon the completion of the work in the locality, promptly replace or repair, at his expense, all public and private roads and fences removed or damaged by him during the progress of the work. In case of his failure to do so, it shall be done by hired labor, and the cost of the same deducted from any moneys due to or to become due him.

33. Drains, ditches, and channels. All sloughs, old pits, ditches, or depressions within 100 feet of the base of the levee on the land side and within 40 feet on the river side shall, when so provided for in paragraph 39, be filled up to the natural surface of the ground. Such work will be included in the estimate of yardage to be paid for at the contract price per cubic yard for embankment, but no material will be paid for both as excavation and fill. All drains, ditches and channels necessary for the proper execution of the work shall be cut and maintained by the contractor at his own expense.

34. Extra excavation work.—In enlargement work under these specifications, when it is deemed necessary to cut into old levees for the purpose of removing defects in such levee, the contractor will be paid for the measured excavations, after they have been refilled, at the same price per cubic yard as for the levee; if the material is necessarily wasted he will be paid for both excavating and refilling.

35. Old levees, spurs, etc.—All existing levees, parts of levees, or spurs must be left intact, unless otherwise stated in paragraph 39 and shown on the plans that they may be cut. In all cases where material in the controlling levee is used or the controlling levee line weakened or destroyed in the construction of a new levee, the work shall be so planned and executed that the new levee or a spoil bank of a net grade and section prescribed by the contracting officer but not exceeding the existing grade and section of the controlling levee, will be completed as the controlling levee is weakened or removed, in order that the work may, with the equipment or facilities available on the job, be promptly tied-in or connected with the controlling levee so as to furnish a continuous levee line for protection in an emergency. Construction plans covering the above requirements shall be submitted to the contracting officer. No method failing to provide this protection will be accepted and no material shall be removed from the controlling levee until such plans have been approved in writing by the contracting officer. These plans shall provide for a minimum number of tie-ins in an emergency. In the event that the construction of tie-in levees is

required before the expiration of the contract period prescribed in paragraph 39 hereof, payment therefor will be made by the United States as prescribed in paragraph 37. Where the method of construction jeopardises the safety of the controlling levee, the contracting officer reserves the right to suspend the contractor's operations for any period or periods of time during the flood season that in the opinion of the contracting officer is warranted, so as to eliminate danger of overflow by unseasonable construction and no claim shall be made by the contractor for damage or expense occasioned by such suspension of operations or occasioned by construction difficulties on account of the building of the tie-in levees.

36. Timber felling.—No felled trees nor parts of trees shall be left on the embankment nor within 5 feet thereof. Such clearing along the ground to be occupied by the new embankment as may be necessary to permit cross-sectioning the work shall be done whenever directed by the contracting officer.

37. Damage or injury to work.—In anticipation of destructive floods during the progress of the work, the contracting officer may require a protection of timber or other material to be constructed around the ends of the levee or elsewhere, and also a temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard; for other protective work he will be paid the actual cost plus 10 per cent. All damage or injury to work, resulting from floods or other causes before the work has been accepted by the contracting officer, shall be sustained by the contractor.

38. Removal of debris.—Upon completion of the work, and before final payment is made, all temporary structures, camps, and other debris must be at once removed or destroyed unless otherwise directed by the contracting officer. Any damage to the levee caused by the contractor shall be repaired by him.

96 39. Description of work.—

The work herein described will be performed as "Straight Contract Work." (See paragraph 7 (a).)

Maps: The work shall conform to maps marked:

53/75, entitled "Black Bayou Enlargement."
53/72, entitled "Lake Lee Setback."
96/95, entitled "Kretchmar Enlargement."
95/64, entitled "James Crossing Setback."
53/73, entitled "Above Longwood Enlargement."
53/74, entitled "Princeton to Carolina Enlargement."
45/50, entitled "Seven Oaks to Mosswood Enlargement and New Levee."
45/48, entitled "State Line Setback and Enlargement."

49/54, entitled "Lake Gassoway Setback and Enlargement."
49/51, entitled "Pilchers Point Enlargement."
49/53, entitled "Old River Enlargement."
49/55, entitled "Old River Setback."
49/56, entitled "Wilson Point, La., New Levee."
49/52, entitled "Elton Slough Enlargement."
49/50, entitled "Lake Providence Front New Levee and Enlargement."
41/46, entitled "Lake Belcoe Levee,"

which form a part of these specifications, and which are filed in the United States Engineer Office, Post Office Building, Vicksburg, Mississippi.

These maps can be seen by prospective bidders by applying at Room 309, Post Office Building, Vicksburg, Mississippi, or at the Central Area Engineer Office, Greenville, Mississippi, for maps 53/75, 53/72, 96/95, 95/64, 53/73, 53/74, 45/50, 45/48, and at the Southern Area Engineer Office, Lake Providence, Louisiana, for maps 49/54, 49/51, 49/53, 49/55, 49/56, 49/52, 49/50, and at the Arkansas Area Engineer Office, McGehee, Arkansas, for map 41/46.

39.1 "East Bank Mississippi River in Mississippi"

"Black Bayou Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
434B-A	434-L	3256+37–3292	Riverside enlargement	333,300	28.2
434L-B		3292–3414+60	Riverside enlargement	272,500	30.8
		3334+25	Dike	11,100	24.8
		3360+83	Dike	6,600	24.1
			Total	290,200	

(a). Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

97 (b) Borrow Pits: The material for the levee on Item 434L–A shall be obtained from riverside borrow pits in accordance with provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50 but not steeper than 1 on 25; and from the old levee to extent shown on map. The material for completing the levee on Item 434L–B, and the dikes at Stations 3334+25 and 3360+83 shall be obtained from the dredge fill marked as borrow on the typical sections shown on the map. Material in borrow not used in the levee shall be dressed to drain away from the levee.

(c) Cross Sections: The net section on this work shall have a 1 on 5 riverside slope, a 12-foot crown, and contain a 1 on 7¼ seepage line.

(d) Dikes: The dikes at Stations 3334+25 and 3360+83 shall be enlarged on downstream side to net section having an 8-foot crown and 1 on 3 side slopes.

39.2 "Lake Lee Setback"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average, height, feet
495L-A		5081+5146	New levee	954, 250	27
			Berm	22, 750	
				977, 000	
495L-B	495-L	5146–5203	New levee	937, 300	27. 5
			Blue hole refill	29, 500	
				966, 800	
495L-C		5203–5265	New levee	972, 300	26. 5
495L-D		5265–5336+54 5=5337+75	New levee	965, 300	26. 5

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for the work shall be obtained from riverside borrow pits in accordance with paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from existing levee where so indicated on map.

(c) Cross Sections: Soil conditions indicate that the following cross sections will be required:

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Station to station:	Type of section
5081+87–5100	"B"
5100–5112	"C"
5112–5188	"B"
5188–5198	"C"
5198–5336+54.5	"B"

(d) False Berm: A false berm, 100 feet wide land side and 100 feet wide river side, measured from the toes of the levee, shall be built between Station 5116+46 and Station 5119. False berm shall have level crown at grade of 118.0 ft. M. G. L. (Net) with side slopes of 1 on 2 from edges of crown to natural surface.

(e) Blue Hole Refill: The blue hole between Stations 5167+65 and 5171+50 shall be refilled to conform to elevation of berm and pit contiguous to the blue hole.

(f) Order of Work: In conformity with paragraphs 17 and 35 of these specifications, the contracting officer will require the con-

tractor or contractors to whom award is made to commence work at such points and to conduct the work in such manner and direction as will insure safety in case of an emergency, by the construction of the minimum length of tie-in levees consistent with the type of plant employed. All construction placed prior to December 1, 1931, shall be brought to a net grade and section at least equal to present grade and section of existing levee, by December 1, 1931; and subsequently to that date no borrow pit shall be opened more than 500 feet in advance of embankment constructed to the same or greater grade and section unless and until specifically authorized by the contracting officer.

39.3 "Kretchmar Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
498 L	498-L	5337+75-5393+45.7	Riverside enlargement	356,000	25

(a) Time: The work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits in accordance with provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from existing levee to extent indicated on map.

(c) Cross Sections: The soil conditions on this item indicate that a Class "B" section will be required throughout.

99 39.4 "James Crossing Setback"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
500 L	500-L Cairo	5393+45.7-5457+54.2-5461+69.7	Construction turn-over	462,000	24

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 154 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from the old levee and from riverside borrow pits in accordance with the provisions of paragraph 25 of these specifications, except that the bottom of the riverside pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25.

(c) Cross Sections: The soil condition on this item indicate that a Class "B" section will be required throughout.

(d) Order of work: Work shall be started on lower end of item and proceed upstream.

39.5 "Above Longwood Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
504 L-A	504-L	5441+68.7-5527	Riverside enlgt	684, 900	28
504 L-B		5527-5606	Riverside enlgt Removing slide	675, 800 4, 200	26
				680, 000	

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for the levee shall be obtained from riverside borrow pits in accordance with paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from the existing levee to extent indicated on map.

(c) Cross Sections: The soil conditions on this item indicate that a Class "B" section will be reuired throughout.

100 (d) Removing Slide: Between Station 5573+52 to Station 5574+55, the slide in the existing levee shall be cut out as shown by typical section on map. If, after excavation, the material therefrom is found to be satisfactory it may be used in the construction of the adjacent enlargement. Payment will be made in accordance with provisions of paragraph 34 of these specifications.

39.6 "Princeton to Carolina Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
517 L	517-L	6280+40-6405	Riverside enlgt	715, 200	22

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for the levee shall be obtained from riverside borrow pits conforming to the provisions of paragraph 25 of these specifications, except that the bottoms of the pits

may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from the existing levee to extent indicated on map.

(c) Cross Sections: The soil conditions on this item indicate that the following type sections will be required:

Station to station:	Type of section
6289+49–6335	"B"
6335–6354	"C"
6354–6385	"B"
6385–6405	"C"

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39.7 "Seven Oaks to Mosswood Enlargement and New Levee"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
505R-A	505-R	2915-3070+92.3=3072+72	Riverside enlgt	837,300	32
			Dike	300	
			New Levee	141,300	20
			Total	978,900	
505R-B	505-R	3072+72-3215	Riverside enlgt	959,000	28
			Scour refill	22,900	
			Total	981,900	
505R-C	505-R	3215-3328+68.5=3329+43.5	Riverside enlgt	831,800	29.5
			New levee	112,200	25
			Berm	30,600	
				974,600	

101 (a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to extent indicated on map. Pits shall conform to the provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25. A 20-foot berm shall be left on each side of dike at Station 2919+09, and the side slopes of pits next to the dike shall be not steeper than 1 on 6.

(c) Cross Sections: Soil conditions indicate that the following type cross sections will be required:

Station to station:	Type of section
2915–3070+92.3=3072+72	"B"
3072+72–3115	"C"
3115–3270	"B"
3270–3301	"C"
3301–3328+68.5	"B"

(d) False Berm: A river-side false berm shall be constructed as follows:

Station to station	Distance from centerline enlgt. to edge of crown	Elev. edge of crown (M. G. L.)	Crown slope	Slope from edge of crown to natural surface
3257+10 to 3288	210'	109.0 ft	1:25	1:2

(e) Scour Refill: A scour in the pits between Stations 3090–3094+05 shall be refilled to the grade of the adjoining pits, estimated yardage 22,900 cubic yards.

(f) Dikes: The dike at Station 2919+00 shall be topped to the new grade with a crown width of 2 feet and side slopes of 1 on 2 to intersection with existing slopes. The dike at Station 2992 shall be cut down at least to ground level, and may, if desired by the contractor, be excavated to borrow pit limits. No payment will be made for cutting down the dike. The material therefrom may be used in the construction of the enlargement or wasted evenly in adjacent pits at the contractor's expense and option.

39.8 "State Line Setback and Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
819 R	819–R	3860+27.9–3986+62.7	Construction turn-over	1,050,000	22
			Enlargement	98,700	28.5
			Berm	10,100	
			Total	1,158,800	

102 (a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits, in accordance with the provisions of paragraph 25 of these specifications, except that the bottom of the pit may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from the existing levee.

(c) Cross Sections: The soil conditions on this item indicate that a Class "B" section will be required throughout.

(d) False Berm: Between Stations 3973–3986+62.7 the trough between the riverside toe of the enlargement and the pit when excavated to allowable pit grade, shall be filled to an elevation of 105.5 M. G. L. (Net), as shown by typical section on the map.

(e) Removal of Cisterns: The old brick cisterns in the base of the levee at Stations 3863, 3875, and 3875+50 shall be dug out and the debris removed from the base of the levee. Payment will be made for refill only, at contract price per cubic yard.

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39.9 "Lake Gassoway Setback and Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
822R-A	822-R	0-24	Riverside enlgt	113, 444	27
		24-57	Constr. turn-over	330, 786	27
		57-110	Riverside enlgt	310, 570	27
			Total	754, 800	

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits conforming with the provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from existing levee between Stations 24 and 57. Between the back of borrow pits and bank of lake, all trees shall be left standing, unless the type of equipment used to enlarge the levee requires this space, in which event the trees may be cut with the permission of the contracting officer.

(c) Cross Sections: The soil conditions on this item indicate that a Class "B" section will be required throughout.

103 39.10 "Pilchers Point Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
822R-B	822-R	110-173	Riverside enlgt	338, 676	27
		173-187	Constr. turn-over	122, 530	27
		187-244	Riverside enlgt	294, 194	27
			Total	755, 400	

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits conforming to the provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not

steeper than 1 on 25; and from existing levee to extent indicated on map. Attention is called to close proximity of old revetment to the back of borrow pits along this front. This revetment shall not be disturbed or damaged. No material shall be obtained from within 25 feet of the base of the dike at Station 241+50. The side slope of the pit next to the dike shall not be steeper than 1 on 2.

(c) Cross Sections: The soil conditions on this item indicate that a Class "B" section will be required throughout.

39.11 "Old River Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
322R-C	322-R	344-410	Riverside enlgt	781,000	26

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for the levee shall be obtained from riverside borrow pits conforming to the provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from the old levee to extent shown on map.

(c) Cross Section: The soil conditions on this item indicate that a Class "B" section will be required throughout.

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39.12 "Old River Setback"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
322R-D	322-R	410-521+40	Construction turn-over	1,188,000	27
		521+40-534+40	Tie-in levee	59,000	27
		534+40-634+40	Old levee topping	3,000	
			Total	1,250,000	

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from existing levee. Pits shall conform to the provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25.

(c) Cross Sections: The soil conditions on this item indicate that a Class "B" section will be required throughout, except in the case of tie-in levee from Station 521+40 to Station 524+40, which shall have 8-foot crown, 1 on 3½ riverside slope and 1 on 4½ landside slope.

(d) Old Levee Topping: The existing levee from Station 524+40 to Station 534+40 shall be enlarged to grade of new levee; with 2-foot crown and 1 on 2 side slopes.

39.13 "Wilson Point New Levee"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
530R-A	530-R	521+40-583	New levee	912,600	27
530R-B		583-644	New levee	918,690	29
530R-C		644-714+28.6=1317	New levee	886,830	26
		1317-1307	Old levee topping	3,000	
		695+75-688	False berm	12,000	
			Total item 530R-C	901,830	

105 (a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for the new levee shall be obtained from riverside borrow pits conforming to the provisions of paragraph 25 of these specifications, except that the bottom of the riverside pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25, and subject to the following additional restrictions:

At the junction of new levee and old levee at Station 714+28.6=1317, no material shall be obtained from within 100 feet of the toe of the old levee, and the side slopes of the pit next to the toe of old levee shall not be steeper than 1 on 2 down to a depth of 3 feet, from which point the outward slope of the pit shall not be steeper than 1 on 50. At the upper end of Item 530R-A, a 100-foot berm shall be left adjacent to landside toes of old levee and proposed tie-in levee, and side slope of pit next to old levee and tie-in levee shall not be steeper than 1 on 2 to a depth of three feet, from which point the outward slope shall not exceed 1 on 50.

(c) Cross Sections: The soil conditions along this stretch of work indicate that a Class "B" section will be required.

(d) Old Levee Topping: The existing levee from Station 1317 to 1307 shall be raised to grade of 128 ft. M. G. L. (net) with 2-foot crown and 1 on 2 side slopes, as shown on drawing. Material therefor shall be procured from riverside borrow pit indicated on drawing.

(e) False Berms: Drainage ditch at Station 622 and drain at Station 687 shall be refilled to natural surface for a distance of 40 feet on riverside and 100 feet on landside toes of new levee, with side slopes of 1 on 2 on riverside and 1 on 6 on landside.

(f) Order of Work: Borrow pits shall not exceed standard landside pit depths with respect to old levee or tie-in levee until river conditions warrant, and after authorized by the contracting officer in writing.

39.14 "Elton Slough Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
540R-A	540-R	1317+00-1345+86.8	Riverside enlgt	126, 220	26
		1345+86.8-1363+00=1365+00	Construction turnover.	164, 458	26
		1365+00-1451+00	Riverside enlgt	324, 739	26
			Total	615, 400	

106 (a) Time: Work shall be commenced in accordance with paragraph 2 of those specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits conforming to the provisions of paragraph 25 of these specifications, except that the bottom of the riverside pits may be excavated on slopes steeper than 1 on 50, but shall not be steeper than 1 on 25; and from existing levee to extent indicated on map. In the construction turnover, Stations 1345+86.8 to 1363+00, any or all of the existing levee may be used in the construction of the new levee. No borrow shall be taken within 300 feet of Lake Providence revetment shown on map.

(c) Cross Sections: The soil conditions along this stretch of work indicate that a Class "B" section will be required throughout.

39.15 "Lake Providence Front New Levee and Enlargement"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
		1451-1455+61.8	Riverside Enlgt	25, 463	26
		1455+61.8-1469+61.8=1471+64.8	Construction turn-over.	107, 166	26
540R-B	540-R	1471+64.8-1481+30.3	Riverside englt	41, 006	26
		1481+30.3-1492+82.3=1500+48.8	New levee	108, 205	24
		1500+48.8-1506+58	Riverside enlgt	311, 840	26
			Total	693, 680	

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 460 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits conforming with the provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from existing levee to extent indicated on map. In the construction turnover, Station 1455+61.8 to Station 1469+61.8=1471+64.8, such portion of the old levee and dike as may not be needed in the construction of the new levee shall be reduced to ground level at the contractor's expense.

No excavation below ground surface shall be made within 200 feet of Lake Providence revetment shown on map.

Any or all of material in old levee, Station 1481+30.3 to Station 1492+82.3=1500+48.8, may be used in the new levee.

107 The material in the old spur levee at Station 1565+50 may be used in the new work, provided, a continuous section of not less than 800 feet adjoining the new work, be cut down to natural ground surface without cost to the United States.

Material for constructing the enlargement between Station 1580 and Station 1598+58 will have to be hauled in from available borrow above and below area shown as "Borrow Pits" on map. A 100-foot berm shall be left adjacent to riverside toe of old levee below Station 1598+58, and side slope of pit next to old levee shall not be steeper than 1 on 2 to a depth of 3 feet, from which point the outward slope shall not exceed 1 on 25.

(c) False Berm: The existing bayou at landside toe of levee in the vicinity of Station 1460 shall be filled to natural ground surface for a distance of 100 feet from the landside toe of levee.

(d) Sewer Pipe Line: The sewer pipe line which crosses the levee at Station 1533 will be removed or the location changed by the Town of Lake Providence without cost to the contractor, who shall notify the Mayor of Lake Providence 10 days in advance of the date upon which construction will reach it. The contractor shall cooperate with the city to the extent of completing the levee at the point to which pipe is to be moved, in advance of its removal, and shall avoid injuring it by his operations. Should removal not be effected by the date agreed upon, or by the time construction requires removal, if later than date agreed upon, enlargement work at the pipe may be omitted from the contract at the option of the contractor.

(e) Maintenance of Vehicular Traffic Crossing: Access to the ferry road, crossing the pits at approximately Station 1515, shall be provided during the entire period of construction.

"South Bank of Arkansas River in Arkansas"

39.16 "Lake Belcoe Levee"

Subproject item No.	Miles below Cairo	Inclusive stations	Kind of work	Estimated, cubic yards	Average height, feet
24	Ark. R	(Sec. 1, 2322/54-2331/61	New levee	33,000	13
		Sec. 2, 2331/61-2338	New levee	57,000	20
		Sec. 3, 2338-2342/73+2351/66	New levee	50,000	11
			Total	140,000	

Award of Sec. 1, 2, and 3 will be made as a whole.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 120 calendar days from date of receipt of notice to proceed.

108 (b) Borrow Pits: Sec. 1—The material for the levee shall be obtained from the riverside and landside hydraulic fill lying outside the proposed levee section, as shown on map. After removal of necessary material from the hydraulic fill, the berms shall be dressed to uniform grade with drainage away from levee.

Section 2—The material for the levee shall be obtained from riverside borrow pits conforming to the provisions of paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25, and that no material shall be obtained below a depth of 20 feet.

Section 3—From Station 2338 to 2342+73, the material for the levee shall be obtained from the hydraulic fill riverward of the proposed levee slope, except for about 1300 cubic yards, which shall be pulled down to form the landside toe, all as shown on map. From Station 2342+73 to 2352+14.5, material shall be obtained from the riverside and landside hydraulic fill beyond the limits of the proposed levee section, as shown on map. After removal of necessary material from the hydraulic fill, the berms shall be dressed to uniform grade with drainage away from levee.

(c) Cross Sections: Class "C" section shall be constructed throughout on Sections 1 and 3, and Class "B" section shall be used on Section 2.

(d) Sodding: No sodding will be required on Sections 1 and 3.

(e) Inspection Ditch: No ditch is required on Sections 1 and 3.

39.17 General Provisions

(a) Award of contract: In submitting bids, contractors shall give in detail a list of equipment and the plan which they propose

to use in the execution of this work. No bids will be considered from contractors unable to show to the satisfaction of the contracting officer that they can place adequate equipment on the job with sufficient promptness to insure its completion on contract time.

(b) Determination of Settlement: Claims for reimbursement for additional yardage under the provisions of first subparagraph of paragraph 28 hereof, to be considered, must be substantiated by measurement of vertical displacement of foundation made within 48 hours after completion of embankment to gross grade and section at the site of the structure installed to determine such settlement.

United States Engineer Office, P. O. Box 667, Vicksburg, Miss., July 21, 1931.

111 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 46,422. Court of Claims. Term No. 1094. The United States, Petitioner, vs. Callahan Walker Construction Company. Petition for a writ of certiorari and exhibit thereto. Filed April 1, 1942. Term No. 1094 O. T. 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed May 11, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

468543—42

U. S. GOVERNMENT PRINTING OFFICE 1942

No. ~~1094~~ 65

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES, PETITIONER

v.

CALLAHAN WALKER CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1094

UNITED STATES, PETITIONER

v.

CALLAHAN WALKER CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on January 5, 1942.

OPINION BELOW

The opinions of the Court of Claims (R. 11–21) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1942 (R. 21). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether an equitable adjustment made by the contracting officer under the standard form Government construction contract is final and binding on all issues of fact or law in the absence of an appeal to the department head in accordance with Articles 3 and 15.

2. Whether the determination of what constitutes an equitable adjustment under Article 3 is a question of fact within the meaning of Article 15 of the contract.

STATEMENT

Respondent, on August 27, 1931, entered into a written contract with the United States for the construction of a levee on the Mississippi State side of the Mississippi River (R. 5). The contract involved the placing of about 3,881,600 cubic yards of earth work and fixed the price for material placed at 14.43¢ per cubic yard (R. 4). The proposed levee was to be set back a short distance from an existing levee, the earth in which, together with that contained in certain land between it and the site of the new levee, was made available for construction purposes (R. 6). The present controversy involves additional work on a section of the new levee extending from station 5113 to station 5123, a distance of 1,000 feet (R. 6).

Respondent commenced work at the south end of the project and proceeded northward (R. 6).

During progress of the work, certain parts of the levee which had been completed south of station 5123 were found to have a tendency to subside (R. 6). At that time 68 percent of the work between station 5123 and station 5113 had been completed (R. 6). Respondent was directed to continue construction of the levee from a point north of station 5113 while investigations were being conducted as to the cause of the subsidence (R. 6). After making numerous tests, it was concluded that the construction of false berms,[1] considerably larger than that called for by the specifications, would check the subsidence. Accordingly, the contracting officer and the engineer officer at the site advised respondent that it would be expected to construct an enlarged berm on the riverside portion of the levee (R. 6–7). The United States undertook to, and did, construct an enlarged berm on the landside of the levee (R. 10).

Respondent protested against construction of the enlarged berm, contending that it constituted a change in the contract, and that the work could not be performed at the contract price because there was not sufficient material readily available on the riverside of the levee opposite the portion at which the false berm was to be located to construct both the berm and levee (R. 6, 23, 39, 42, 49, 57). It contended that additional material

[1] A false (or artificial) berm is an earthwork, extending on either side of the base of a levee, which reinforces the foundation of the levee proper.

would have to be brought to the site from other points and that the cost of handling the additional material would exceed the contract price (R. 51–52). The contracting officer and the engineer officer were of the opinion that adequate material was available at the site, and that no increase in cost would be incurred (R. 39, 40, 41); they accordingly issued oral instructions to respondent to erect the enlarged false berm. Respondent protested orally to the contracting officer, and stated that it would later assert a claim for the extra costs which it expected to incur in constructing the berm (R. 6). On October 18, 1932, a written order directing construction of the false berm was issued by the contracting officer to respondent (R. 6). In that order respondent was advised that it would be given 100 percent credit for the embankment to the south of station 5123 where the subsidence had occurred, and that payment for additional yardage made necessary by the construction of the false berm would be made at the contract price per cubic yard (R. 7). The additional work required by the change order was necessary for completion of the project (R. 7).

Article 3 of the contract reads as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the gen-

eral scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 15 provides as follows:

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the con-

tractor shall diligently proceed with the work as directed.

Respondent made no claim for an equitable adjustment after the change order was issued, and did not appeal from the order to the head of the department (R. 24, 26, 27, 31). It subsequently developed that additional material had to be drifted into the site of the work (R. 8-9). The work of drifting or hauling in the material was performed by a subcontractor, who agreed to accept the contract price in full payment if respondent were unable to secure an additional allowance from the United States (R. 9). Respondent was paid for the additional work at the contract rate of 14.43¢ per cubic yard (R. 8), which it accepted under protest (R. 8). On December 28, 1932, respondent filed a claim with the contracting officer for $16,952.79, as representing the excess cost of the additional work over the contract price (R. 10-11). No part of the claim was paid, and respondent filed suit in the Court of Claims on August 6, 1935. The court entered judgment for respondent in the sum of $13,989.92, two judges dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The court erred:

1. In holding that it had authority to review the order of the contracting officer and to substitute its own views for his judgment.

2. In holding that what constitutes an equitable adjustment under Article 3 of the contract is a question of law.

3. In holding that the terms of the order of the contracting officer specifying the contract price per cubic yard for additional yardage constituted a conclusion of law and not a decision on a disputed issue of fact within the meaning of Article 15 of the contract.

4. In holding that the contracting officer was without authority to decide any issue of law or construction of the contract arising under Article 3 of the contract.

5. In making an independent determination that the change order issued by the contracting officer resulted in an increase in the cost of performance per cubic yard.

6. In making an independent determination that respondent was entitled to an increase in the amount due under the contract per cubic yard as a result of the change order issued by the contracting officer.

7. In making an independent determination of the amount of increase per cubic yard due respondent.

8. In failing to find as facts that respondent made no claim for adjustment within ten days from the date of the order of the contracting officer and that respondent took no appeal to the head of the department within thirty days from

the date of the order in accordance with Articles 3 and 15 of the contract.

9. In failing to hold that the order of the contracting officer, in the absence of an appeal to the head of the department as provided in Articles 3 and 15 of the contract, was final and binding, and not subject to judicial review on all issues of fact or law arising under Article 3 of the contract.

10. In failing to hold that the order of the contracting officer could not be set aside when no appeal therefrom had been made to the head of the department.

11. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

The majority of the court below held that the question whether the amount allowed by the contracting officer is an "equitable adjustment" as required by Article 3 is one of law (R. 20–21, 24, 26), and that since Article 15 limits the contracting officer's authority to settle disputes to questions of fact only, he therefore was without authority to resolve disagreements concerning the amount of an adjustment under Article 3 (R. 2, 16, 18–19). Accordingly, it held that the contractor's failure to appeal to the department head in the manner provided by Article 15 was immaterial and that the court below was entitled to make an independent determination of the amount which should be allowed the respondent as an

equitable adjustment for any increased cost caused by the change order.[2] Judge Madden filed a dissenting option, in which Judge Jones concurred (R. 19–21).

The question presented, we submit, is one of manifest importance. The provisions of Articles 3 and 15 have been included in the standard form Government contruction contract since 1926.[3] The

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[2] The opinion of Judge Green, concurred in only by Chief Justice Whaley, also rests on the alternative ground that the contracting officer had failed to make any equitable adjustment and that this constituted a breach of contract (R. 18). This conclusion, however, was based solely on the fact that, as appeared from the face of the change order, the contracting officer had allowed only the contract price for additional yardage, although, as the two judges found, the change order resulted in an increased cost per cubic yard (R. 18); it was therefore apparently inferred that the contracting officer had construed the contract to require the contractor to supply the additional yardage at the contract price without regard to whether any increase in cost would result. As Judge Green's alternative ground rests on a finding as to the increased cost caused by the change order, it cannot be sustained unless determinations as to such matters are for the court rather than for the contracting officer. The contracting officer had concluded that in fact no increase of cost would result (R. 27–30). Moreover, even if the contracting officer had not attempted to make an equitable adjustment, the contractor could not complain since he failed to make a claim for such adjustment within ten days from the date of the change order as required by Article 3.

[3] Similar provisions are included in the standard form for other types of Government contracts. Article 15 of P. W. A. Form No. 51, which has been used by the Public Works Administration, authorizes the contracting officer to settle all disputes without limitation to issues of fact, and in some standard form contracts equally broad provisions have been

issuance of change orders and accompanying adjustments in price under Article 3 is, of course, a matter of general practice and is a common source of litigation in the Court of Claims. The question whether disputes as to the amount of adjustment are to be settled judicially or, as the contract apparently contemplates, by the contracting officers and department heads, is thus one which closely touches the day to day administration of Government construction contracts generally.

The novel doctrine announced below cannot readily be rested on accepted principles or any provision of the standard form contract. The contract provisions, which were presumably intended to avoid vexatious and expensive litigation, should be given hospitable scope. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Martinsburg & Potomac R. R. Co.* v. *Marsh*, 114 U. S. 549, 553. The authority granted by Article 3 to the contracting officer to make equitable adjustments is not limited in terms to issues of fact and the reference in that provision to Article 15 was intended, we suggest, to incorporate the procedure pre-

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included in the specifications. Under provisions of this character, if properly construed, the distinction between questions of fact and questions of law would seem immaterial. Cf. *United States* v. *McShain*, 308 U. S. 512. It is impossible to say what percentage of Government contracts employ the standard form "disputes" clause limiting the contracting officer's authority to the determination of issues of fact but there is no doubt that this clause has been widely used.

scribed by the latter provision for the settlement of any issue with respect to an adjustment under Article 3 and not to limit the contracting officer's authority to the settlement of issues of fact. The question, in situations like that presented in the instant controversy, of what adjustment is to be made because of changed conditions which are asserted to give rise to increased cost is one which the contracting officer and the department heads are specially competent to decide. The procedure of conclusive administrative determination is therefore particularly appropriate. Accordingly, it seems clear that the procedure was intended to be applied to adjustment issues whether or not they be termed issues of law or of fact.

In any event, the contracting officer's determination of the price to be paid for the additional work was solely one of fact. The construction of the terms of the contract obligation, which on familiar principles might be deemed an issue of law, was not in controversy; the contracting officer properly assumed that the respondent was entitled to an amount sufficient to compensate him for any over-all increase of cost (R. 29–30). The sole inquiry was whether and to what extent the change order would result in an increase of cost, and this seems obviously a question of fact.

The decisions of this Court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 114, 115, 119; and *Securities Commission* v. *United States Realty*

Co., 310 U. S. 434, 452, which were thought by the court below to require a contrary conclusion, are not in point. They merely hold that the term "fair and equitable" as used in Section 77B and Chapters X and XI of the Bankruptcy Act are "words of art" which have acquired a fixed meaning under prior decisions of this Court and that the question whether any plan of reorganization conforms to the statutory standard is for the courts and not for the majority of the security holders. The novel application of these rulings to the wholly unrelated field of equitable adjustments under Government contracts suggests that an authoritative decision of this Court clarifying the reach of its decisions in the reorganization cases is necessary. Cf. *English Construction Co., Inc.* v. *United States* (D. Del.), decided January 14, 1942.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.

U. S. GOVERNMENT PRINTING OFFICE, 1942

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 65

THE UNITED STATES, PETITIONER

v.

CALLAHAN WALKER CONSTRUCTION COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (R. 11–21) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1942 (R. 21). The petition for a writ of certiorari was filed April 1, 1942 (R. 106), and granted May 11, 1942. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether an equitable adjustment made under Article 3 of the standard form Government construction contract constituted a determination of fact so as to be final and binding in the absence of an appeal to the department head in accordance with Article 15.

2. Whether the equitable adjustment was final and binding even if it constituted a determination of law.

STATEMENT

In 1931 respondent and the United States entered into a written contract for the construction of a levee on the Mississippi side of the Mississippi River, by which the respondent agreed to place approximately 3,881,600 cubic yards of earth work for 14.43¢ per cubic yard (R. 4, 5). The proposed levee was to be set back a short distance from an existing levee; the earth in the existing levee, together with the earth borrowed from certain land between it and the site of the new levee, were made available for the construction (R. 5–6). This controversy involves additional work on an enlarged false berm[1] which was constructed in connection with a section of the new levee extending from station 5113 southward to station 5123, a distance of 1,000 feet (R. 5–6).

[1] A false (or artificial) berm is an earthwork, extending on either side of the base of a levee, which reinforces the foundation of the levee proper.

Respondent began work at the south end of the project, and proceeded northward. In the course of this work, however, after respondent had completed 68 percent of the construction between stations 5123 and 5113, parts of the levee already constructed south of station 5123 were found to have a tendency to subside. As a result, on October 7, 1932, the contracting officer for the United States directed respondent to stop work on the section between stations 5123 and 5113 and to resume construction of the levee from a point north of station 5113 while investigations were being conducted to determine the cause of the subsidence. (R. 6.) After investigation the contracting officer concluded that the construction of an enlarged false berm, not called for in the original specifications,[2] would forestall any subsidence in the section from station 5123 to station 5113. Accordingly, on October 18, 1932, the contracting officer issued a written order to respondent directing con-

[2] The original specifications provided for a false berm, between station 5116–46 and station 5119, "100 feet wide landside and 100 feet wide riverside, * * * with a level crown at grade of 118 feet mean gulf level (net) with side slopes of 1 on 2 from edges of crown to natural surface" (R. 6). The change order additionally provided for a riverside false berm from station 5113 to station 5123 "having a riverside crown elevation of 120 feet M. G. L. at a distance of 250 feet from the centerline and sloping upward toward the levee on a 1 on 18 slope and downward to the ground surface on a slope of 1 on 6" (R. 6–7). This involved an increase of 64,469 cubic yards to be placed for berms in this section over the amount estimated originally in the specifications (R. 8).

struction of an enlarged false riverside[*] berm. The order advised respondent that it would be given 100 percent credit for the embankment to the south of station 5123 where the subsidence had occurred, and that payment for additional yardage made necessary by the construction of the false berm would be made at the contract price per cubic yard. (R. 6–7.) The additional work required by the change order was necessary for completion of the project (R. 7).

Article 3 of the standard form Government construction contract, utilized here, provides (R. 64):

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is

[*] The United States undertook to, and did, construct an enlarged berm on the landside of the levee (R. 10).

ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.[4]

Article 15 provides as follows (R. 68):

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Concerning the respondent's negotiations and protests relating to the contracting officer's order of October 18, 1932, the court below found only that the order was issued "against plaintiff's [respond-

[4] Paragraph 14 of the specifications provides as follows (R. 84):

"14. *Modification of specifications.*—The right is reserved to make such changes in the work contemplated under these specifications as may be necessary or expedient to carry out the intent of the contract or to meet conditions not now anticipated; but no such modification shall be made the basis of a claim for extra compensation, except as provided in the regular form of contract to be entered into."

ent's] objections" on the ground that the order constituted a change in the contract and that an extra price should be allowed; it also found that respondent gave oral notice to the contracting officer that it would later assert a claim for the extra costs which it expected to incur in constructing the berm (R. 6). The court below found further that in the course of constructing the berm, it developed that additional material had to be hauled or drifted into the site of the work, that sufficient material was not available on the riverside of the levee opposite the section in question, and that the work of drifting or hauling in the material was performed by a subcontractor who agreed to accept the contract price in full payment if respondent were unable to secure an additional allowance from the United States (R. 8–9). In addition, the court found that at the completion of its work, respondent accepted the last payment "under protest" (R. 9).

The court made no other findings relating to the respondent's negotiations, protests, or other steps in connection with the contracting officer's order. The evidence, however, established the facts as to the relevant course of events.

Respondent's protests were confined to the period preceding the issuance of the change order on October 18, 1932 (R. 23–24, 25–26, 39, 42–43). This is established by respondent's own testimony and is not disputed. It is also undisputed that subse-

quent to the issuance of the order, respondent made no claim for an equitable adjustment, and made no appeal to the head of the department (R. 24, 26, 27–28, 31).

In respect of respondent's negotiations, preceding the issuance of the change order, with petitioner's engineers as to the new enlarged berm, there is testimony that respondent's officers, on October 13 and 14, 1932, claimed that the work could not be performed at the contract price because there was not sufficient material readily available at the site (R. 23, 39, 40, 49, 56–58), that additional material would have to be brought to the site from other points, and that the cost per yard of handling this additional material would exceed the contract price (R. 41, 44–45, 56–58).[4] The contracting officer and the engineer in charge testified that they had been of the opinion that adequate material was available at the site, that no increase in cost would result (R. 27, 28, 29, 30, 32), and that, if this had not been their view, they would not have stipulated the contract price in issuing the order (R. 29). They accordingly issued oral instructions on October 14, 1932, to respondent to erect the enlarged false berm (R. 27, 31, 32) which were confirmed by the formal order of October 18, 1932 (R. 6, 27, 32).

[4] There is also some testimony, however, that respondent did not rely on the shortage of adequate material in the discussions with petitioner's engineers (R. 30, 49, 50–51, 56).

Respondent's officers testified that they had understood that petitioner's contracting officer had agreed that they could proceed on a cost plus basis, and that a bill for "extra costs" would be submitted at the completion of the work (R. 24, 26, 42, 47, 58–59); they testified that they had regarded the written order of October 18 to be "just for a matter of record" (R. 59, 46). Petitioner's contracting and engineer officers denied that any agreement for payment on a cost plus basis had been made or that the written order differed from the oral directions (R. 27–30, 31, 33, 47–48, 50). These officers testified that they had merely informed the contractor that if it was dissatisfied with this order it could present a claim buttressed by detailed proof of its costs (R. 33–34, 47–48) and that it "had a right to protest the ruling of the District Engineer," who was the contracting officer (R. 34). Respondent's witnesses themselves admitted that no promise of payment on a cost plus basis had been made to them (R. 45–47). The findings and opinions of the court below clearly show that it gave no weight to this contention of respondent's (R. 6–7, 11–12, 18, 19).

Respondent was paid for the additional work at the contract rate of 14.43¢ per cubic yard (R. 8) which it accepted under protest (R. 8–9). On December 28, 1932, it filed a claim with the contracting officer for $16,952.79, as representing the ex-

cess cost of the additional work over the contract price (R. 10–11). No part of the claim was paid, and respondent filed suit in the Court of Claims on August 6, 1935. The court entered judgment for respondent in the sum of $13,989.92, Judges Madden and Jones dissenting.

The majority of the court held that the making of an "equitable adjustment" under Article 3 constitutes the determination of a question of law (R. 14, 17, 18–19) and that since Article 15 limits the contracting officer's authority to settle disputes to questions of fact only, the officer was without authority to resolve disagreements concerning the amount of an adjustment under Article 3 (R. 18–19). Accordingly, it held that the contractor's failure to appeal to the department head in the manner provided by Article 15 was immaterial (R. 17, 19) and that the court below was entitled to make an independent determination of the amount which should be allowed the respondent as an equitable adjustment for any increased cost caused by the change order (R. 17, 19). The "opinion of the court," delivered by Judge Green, and concurred in on this point only by Chief Justice Whaley, also rests on the alternative ground that the contracting officer had failed to make the equitable adjustment required by Article 3, and that this constituted a breach of contract (R. 12, 13, 17).

SPECIFICATION OF ERRORS TO BE URGED

The court erred:

1. In holding that it had authority to review the order of the contracting officer and to substitute its own judgment for that of the contracting officer.

2. In holding that what constitutes an equitable adjustment under Article 3 of the contract is a question of law.

3. In holding that the order of the contracting officer specifying the contract price per cubic yard for additional yardage constituted a conclusion of law and not a decision on a disputed issue of fact within the meaning of Article 15 of the contract.

4. In holding that the contracting officer was without authority to decide any issue of law arising under Article 3 of the contract.

5. In failing to hold that the contracting officer had made any equitable adjustment required by Article 3 of the contract.

6. In making an independent determination concerning the amount due respondent as an equitable adjustment under the change order.

7. In failing to find as facts that respondent made no claim for adjustment within ten days from the date of the order of the contracting officer and that respondent took no appeal to the head of the department within thirty days from the date of the order in accordance with Articles 3 and 15 of the contract.

8. In failing to hold that the order of the contracting officer, in the absence of an appeal to the

head of the department as provided in Articles 3 and 15 of the contract, was final and binding, and not subject to judicial review on any issues of fact or law arising under Article 3 of the contract.

9. In failing to hold that the order of the contracting officer could not be set aside when no appeal therefrom had been taken to the head of the department.

10. In entering judgment for the respondent.

SUMMARY OF ARGUMENT

A. As an alternative basis of their holding that respondent was entitled to recover, two of the judges of the court below concluded that the contracting officer wholly failed to make an equitable adjustment as required by Article 3 and, that therefore, a breach of the contract occurred. The conclusion is based solely upon an inference thought to arise from the fact that the contracting officer set as the rate per cubic yard for the extra work the same rate which had been originally prescribed for the work contemplated in the contract, although subsequent events proved the extra work to be more costly. But the undisputed evidence establishes the inference to be untenable. The record plainly shows that the contracting officer recognized both that the order constituted a change in the specifications of the contract and that an equitable adjustment was necessary. He investigated the availability of the

material for the extra work and considered the cost of such work. After such investigation, he prescribed the rate which he thought would compensate for the work. Clearly, therefore, he purported to make an adjustment of the amount due under the contract in a sum he thought equitable.

B. The disputed issue resolved by the contracting officer in making the equitable adjustment was solely one of fact. The question was whether, and the extent to which, the added work increased the cost; this depended in turn upon such issues as the availability of the necessary material, its location, its suitability, the machinery required and similar factors. That these questions were factual is plain both as an original matter and under well-established principles. For it is settled that the question of the extent to which costs are increased by changes in a contract is one of fact; similarly it is settled that issues of "reasonable price" in general contract law and of "reasonable value" in eminent domain proceedings are normally factual and susceptible of final determination by nonjudicial fact-finding tribunals.

These principles are decisive here; no different conclusion is compelled, as the majority of the court below thought, by this Court's decisions in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106,

and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434. Those cases, dealing only with the terms "fair and equitable" as used in Section 77B and Chapters X and XI of the Bankruptcy Act are inapposite here. And since in this case the issue resolved was entirely one of fact, the contracting officer's decision was final and conclusive in the light of respondent's failure to appeal the decision to the department head as prescribed by Articles 3 and 15 of the contract.

C. But even if the disputed issue determined by the contracting officer were an issue of law, the contracting officer's equitable adjustment would be final under Article 3 in the absence of appeal. Article 3 gives the contracting officer full power to make equitable adjustments; the power is not confined to issues of fact. Since Article 3 provides that all disputes relating to equitable adjustments shall be determined in the manner prescribed by Article 15, we think that the parties intended to authorize the contracting officer's final resolution of legal, as well as factual, issues. Since this is so, whatever may be the correct characterization of the disputed issue, respondent is precluded from recovery since the contracting officer's determination was conclusive in the absence of appeal.

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ARGUMENT

THE CONTRACTING OFFICER'S UNAPPEALED ORDER THAT THE ADDITIONAL WORK WAS TO BE PERFORMED AT THE CONTRACT PRICE PRECLUDES RECOVERY OF ANY LARGER AMOUNT

It is not disputed that the construction of the enlarged false berm ordered by the Government's officers was a change in the specifications of the original contract, and within their general scope. Article 3 of the contract was therefore admittedly applicable (Resp. to Pet., pp. 1, 2, 3). Article 3 requires an "equitable adjustment" to be made if such a change causes an increase or decrease in the amount due the respondent under the contract or in the time required for its performance. Machinery is established by this article for the determination by the contracting officer of the proper "equitable adjustment," and for the resolution of disagreements between him and the contractor by appeal to the head of the department. But respondent, without invoking this contractual appeal procedure, seeks recovery, through judicial action, of excess costs incurred because of the change. The majority of the court below held that respondent's course was proper and that respondent was not required to follow the procedure provided by Articles 3 and 15 of the contract since those articles confer no finality upon a contracting officer's finding that an adjustment is "equitable." The court held, therefore, that administrative appeal was unnecessary and that it was entitled in-

dependently to determine whether the adjustment was "equitable."

A. *The contracting officer purported to make an equitable adjustment under Article 3*

The central issues in this case, and those concerning which we petitioned for certiorari, are (1) whether an equitable adjustment made, in the circumstances of this case, by the contracting officer, is a determination of fact or law, and (2) whether the contracting officer's equitable adjustment is conclusive in the absence of appeal by respondent. It is our position that the determination made by the contracting officer was a determination of issues of fact only and not of "legal" issues, such as those involved in the construction of the contract or specifications, and that, consequently, the contracting officer's unappealed adjustment is conclusive. We shall contend further that even if the contracting officer's adjustment constituted a determination of law, it is final and binding under Article 3 of the contract.

But at the threshold of the inquiry into these issues we are met by respondent's contention, accepted by two judges of the court below as an alternative ground for their decision, that in any event the contracting officer did not here make any adjustment at all since he merely prescribed the existing contract rate; a breach of contract, accordingly, was said to result (R. 12, 13, 17).

Before we discuss the central issues, therefore, we shall examine the question whether in fact the contractor made an equitable adjustment as required by Article 3.

The conclusion of Judge Green and Chief Justice Whaley that the contracting officer had wholly failed to make the adjustment required by Article 3 (R. 12, 13, 17),* was based upon the fact that, as appears from the face of the change order (R. 7), the contracting officer allowed a price per cubic yard for the additional yardage identical to the price per yard provided for in the contract, although, as the two judges thought, "the findings show clearly changed conditions which [actually] made the additional work more costly not merely in quantity but per yard" (R. 12). It was, accordingly, apparently inferred that the contracting officer must have construed the contract automatically to require respondent to supply the added earth at the contract price without regard to whether any increase in cost would result (R. 12, 13). But the undisputed evidence is plainly to the contrary. The record readily establishes that the contracting officer, Major Larkin, fully recognized that a change within the scope of Article 3 was contemplated and determined that the same price as that paid the contractor for its work on the levee (14.43 cents per cubic yard) was fair compensation

* It is to be noted that the court's findings of fact contain no such finding.

for the work to be done in constructing the enlarged false berm, since in his view sufficient extra material was readily accessible and could be secured by the same methods as those then being used by the contractor.

Major Larkin clearly understood that this order constituted a change in the specifications of the contract (R. 27) and that the order required an equitable adjustment. He issued the order under Paragraph 14 of the Specifications (R. 27), which reserves to the United States the right "to make such changes in the work contemplated under these specifications as may be necessary or expedient to carry out the intent of the contract or to meet conditions not now anticipated" (R. 84); the paragraph adds that "no such modification shall be made the basis of a claim for extra compensation, except as provided in the regular form of contract to be entered into." This latter provision plainly refers to and incorporates Article 3 of the contract. Major Larkin, acting under these provisions, set the unit contract price as that to be paid for the extra work, not because he construed the original terms of the contract to require it, but because he was of the opinion that the enlarged berm could be constructed in the same manner as respondent had been building the levee (R. 28–30). Respondent alleges that it claimed that its costs would be increased because sufficient material was not readily available and would have to be hauled from a dis-

tance, but the contracting officer thought "there was sufficient material opposite those stations in the limits of the right-of-way for the completion of the river-side false berm, and completing the levee" (R. 28, 30). This material appeared to Major Larkin to be "suitable" and "satisfactory" (R. 28, 29, 30). He considered the cost to the contractor and would not have ordered the work to be done at the contract price if he had thought the material available nearby was not suitable and could not be handled by respondent's tower machine, and that material would have to be hauled or drifted to within reach of the machine (R. 29–30). The engineer officer, Lieutenant Pence, also thought there was ample suitable material within the right-of-way available for construction purposes (R. 32). The Government officers had investigated "to be sure there was sufficient dirt there" (R. 29, 51). Moreover, they expressly pointed out to the contractor that it had the right to protest the contracting officer's ruling (R. 33–34, 47–48).

This uncontradicted testimony, therefore, plainly establishes that the contracting officer purported to make an adjustment of the amount due under the contract in a sum which he thought equitable.[7]

[7] Article 3 requires all changes "involving an estimated increase or decrease of more than Five Hundred Dollars" to be "approved in writing by the head of the department or his duly authorized representative." The change in question involved an estimated increase of more than five hundred dollars, but was not approved by the head of the department.

The fallacy of respondent's contention in respect of this issue lies in the unwarranted assumption that since the cost of the work on the enlarged berm *subsequently* proved in fact to be greater than the cost of the work on the levee, the contracting officer could not have thought otherwise at the time he made his estimate and issued the change order, and must therefore be taken to have intended no "adjustment." See e.g. R. 12. But clearly the mere fact that the contracting officer's judgment concerning the availability of material and the cost per cubic yard ultimately proved to be erroneous does not warrant the conclusion that he did not attempt to make an adjustment at all.[8] Nor can the sug-

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Cf. R. 60. Judge Green's opinion states that the contracting officer was the duly authorized representative of the head of the department "and has so been treated in all of our decisions" (R. 12). But cf. Art. 18 (a), R. 69. The Government's petition for a writ of certiorari did not present this question, and, without agreeing with Judge Green's interpretation, we shall not urge the contention here. We may point out, however, that if the change order was not properly issued under Article 3 because of the failure to secure the approval of the Secretary of War, respondent, under the well-accepted rule, can recover nothing for extra work done under such an invalid directive. *Hawkins* v. *United States*, 96 U. S. 689; *Plumley* v. *United States*, 226 U. S. 545, 547–548; *Hardwick* v. *United States*, C. of Cls., No. 43428, decided January 5, 1942; *McGlone* v. *United States*, C. of Cls., No. 43828, decided April 6, 1942, slip sheet, pp. 27–28.

[8] The contention also seems to be that no "change" in compensation contemplated by Article 3 was made because there was no addition to the contract price per cubic yard. But there obviously was an increase in the amount due the respondent under the contract within the meaning of Article

gestion be entertained that the "adjustment" must be made after the completion of the work, when the actual costs can be more accurately calculated. Article 3 clearly requires the adjustment to be made contemporaneously with or soon after the change order is issued as the establishment of a price in advance, exactly as is the setting of the original contract price before the contract work is begun. The adjustment is to be a modification of the original contract in advance of performance, either by agreement of the parties or by decision of the officers appointed in the contract for that purpose. Such is the only permissible construction of the terms of Article 3, and, we are informed, such has been the uniform understanding of that provision by Government contracting officers and contractors alike.

B. *The contracting officer's unappealed equitable adjustment under Article 3 is final and binding since the disputed issue determined by the officer was solely one of fact*

By failing to appeal to the head of the department (the Secretary of War) from the equitable adjustment made by the contracting officer, respondent neglected to pursue the departmental remedy expressly provided by the contract. Article 3 of the contract provides that if the parties

3, and that provision does not require higher unit prices to be paid for additional work where the contracting officer is of the view that the existing prices will fairly compensate for the extra performance required.

cannot agree upon an adjustment the dispute shall be determined as provided in Article 15.[9] The latter article, in turn, provides that all disputes concerning questions of fact shall be decided by the contracting officer, subject to written appeal to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact.

It is settled that failure to exhaust the administrative remedy by not taking the appeal provided by Article 15 and similar contract clauses constitutes a complete bar to suit in the Court of Claims to recover sums greater than those allowed by the contracting officer.[10] And it is equally well established

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[9] Article 3 also requires any claim by a contractor for adjustment under that article to be asserted within ten days from the date the change is ordered. Respondent made no such claim within ten days after the change order was issued on October 18, 1932, but there is evidence and the court below found that it did protest prior to the issuance of the formal order and its position was known to the Government's officers at that time (R. 6, 19–20).

[10] *Bray* v. *United States*, 46 C. Cls. 132, 138–139; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 734; *Horace Williams Co.* v. *United States*, 85 C. Cls. 431, 441; *John McShain, Inc.* v. *United States*, 88 C. Cls. 284, 299, reversed on other grounds, 308 U. S. 512, 520; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266; *General Contracting Co.* v. *United States*, 92 C. Cls. 5, 12–13, 29; *Jacob Schlesinger, Inc.* v. *United States*, 94 C. Cls. 289; cf. *Steel Products Eng. Co.* v. *United States*, 71 C. Cls. 457, 476; *Winchester Mfg. Co.* v. *United States*, 72 C. Cls. 106, 138. Compare the analogous doctrine in the field of administrative law that a failure to

that a contracting officer's unappealed determination of an issue of fact, under a clause such as Article 3, is conclusive upon the contractor, the Government, and the court, especially in the absence of fraud, bad faith, or gross error implying bad faith.[11]

While respondent's petition in the court below makes no claim that the contracting officer acted arbitrarily, fraudulently, or in bad faith (R. 1–3), and the court below did not so find (R. 16), respondent nevertheless contended, and the majority of the court agreed (R. 17, 18, 19), that these settled principles are inapplicable here since the contracting officer's equitable adjustment of the amount due respondent for the construction of the enlarged berm involved not a question of fact, but one of law, which neither the contracting officer nor the head of the department was author-

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exhaust administrative remedies precludes resort to the courts. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 51; *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 282 (App. D. C.), certiorari denied, 305 U. S. 625; Berger, *Exhaustion of Administrative Remedies* (1939), 48 Yale L. J. 936.

[11] *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Kihlberg* v. *United States*, 97 U. S. 398, 400; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185; *McIntyre* v. *United States*, 44 C. Cls. 448, 452–3; *Lustbader Construction Co.* v. *United States*, 62 C. Cls. 549, 561; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266.

ized to decide (R. 17, 18, 19). It was held that what is an equitable adjustment is always an issue of law concerning which the court must make an independent determination. Although at a subsequent point (*infra*, pp. 31–34) we shall urge that even if the equitable adjustment may be deemed the determination of a question of law the contracting officer's decision was conclusive, we nevertheless submit that in any event the majority of the court below was in error since in this case the only disputed issue involved in the determination of the proper "equitable adjustment" was one of fact; the contracting officer's decision, accordingly, was conclusive.

Every adjustment of the contract amount under Article 3 involves, of course, some general value judgment made by the deciding officer upon the basis of his conception of what is "equitable" in the circumstances. In certain cases there may be disagreement between contractor and contracting officer on the applicable major proposition, and the issue may or may not be termed "legal." But here there is no such dispute.[12] Respondent con-

[12] There are, of course, many issues involving value judgments as to what the circumstances require, which present questions of "fact" for the contracting officer's decision, just as determinations of "reasonableness" or "fairness" are frequently for the jury at common law, or for an administrative tribunal acting under a regulatory statute. Henderson, *The Federal Trade Commission*, pp. 92–103; Isaacs *The Law and the Facts* (1922) 22 Col. L. Rev. 1; Bohlen, *Mixed Questions of Law and of Fact* (1924) 72 U. of Pa. L. Rev. 111; Thayer, *A Preliminary Treatise on Evidence*, 190 *et seq.*, 202–3; cf.

tends only that it is entitled to an amount sufficient to compensate it for its over-all increase of cost, if any, and the Court of Claims purported to give it no more. Petitioner's contracting officer made exactly the same assumption (R. 28-30). As we have shown, he assumed that the price for the additional work should be so fixed as to compensate the contractor for the value of the additional work and for increases of cost, if there were any, and to permit operation without loss. The sole inquiry was directed toward ascertaining the extent to which the change order would result in an increase of cost; this issue, even though partially involving prediction of future events, as well as observation of the present and the past, is plainly a question of fact and not one of law. Cf. *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510, 526. The contracting officer decided that sufficient material was readily available to enable the respondent to handle the material and construct the enlarged berm in the same manner in which it had proceeded on the work already completed, and that, accordingly, the unit cost for the extra work would be identical with the unit cost of constructing the levee and berm originally specified in the contract.

Gray v. *Powell*, 314 U. S. 402; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, Nos. 265, 268, Oct. Term, 1941, decided March 16, 1942; *Board of Trade* v. *Olsen*, 314 U. S. 534, 546. See *infra*, pp. 26–29. Our contention is that the present case is *a fortiori*, since it does not even present an issue of this type.

(R. 28–30). That after the event, the Court of Claims decided that the contracting officer's decision was erroneous does not make it any the less a determination of fact in the most usual sense. And it is plain that mere error does not vitiate the contracting officer's authorized determinations of fact.[13] See *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553–554; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185, 195.

It is settled that the question of the extent to which a contractor's costs will be increased by changes in his contract is one of fact. The Court of Claims has frequently characterized determinations by contracting officers of the amount of increase in cost caused by a change order under Article 3 or 4[14] of the standard form contract as fac-

[13] As Judge Madden pointed out, "the contracting officer's decision as to the price was near enough to being right so that the plaintiff's subcontractor was willing to agree to do the work for that price, if it turned out to be all that plaintiff received from the Government" (R. 21).

[14] Article 4 of the standard form contract provides that if the contractor for the Government discovers during the progress of the work subsurface or latent conditions at the site materially different from those shown on the drawings or indicated in the specifications, such conditions shall be called to the attention of the contracting officer, who shall thereupon investigate them. If he finds that they differ materially from the conditions shown in the drawings or specifications, he is required to make such changes in the drawings or specifications as he may find necessary, with the written approval of the head of the department, "and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

tual, binding on court, contractor, and Government. *Sexton* v. *United States*, 82 C. Cls. 550, 553–554, 561–562; *H. B. Nelson Construction Co.* v. *United States*, 87 C. Cls. 375, 379, 384, 386; *S. M. Siesel Co.* v. *United States*, 90 C. Cls. 582, 598–9; *Dewey Schmoll, Assignee* v. *United States*, 91 C. Cls. 1, 31–32; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 637, 669; cf. *Thompson* v. *United States*, 91 C. Cls. 166; *J. W. Rumsey* v. *United States*, 88 C. Cls. 254.[16] The court has recently explicitly held that the related question of the rental value of equipment kept idle by the Government's delay is a factual issue on which the contracting officer's decision is final. *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 112–113, certiorari denied, 312 U. S. 697.

General contract and commercial law similarly establishes that questions such as that determined by the contracting officer here are questions of fact. It is familiar learning that the determination in the ordinary common law case of the "reasonable price," "reasonable compensation," or "reasonable value" implied in contracts containing no other

[16] Similarly, the Court of Claims has frequently upheld a contracting officer's decision that a change order under Article 3 will cause an increase in the time required for the performance of the contract, the other factor specifically mentioned in the provision (e. g., *Carroll* v. *United States*, 76 C. Cls. 103, 113, 120, 124–127; *McShain Co.* v. *United States*, 83 C. Cls. 405, 407, 409), and has recently squarely characterized the issue as one of fact. *Ross Engineering Company, Inc.* v. *United States*, 92 C. Cls. 253, 260.

specific price term is generally one of fact for the jury. *United States* v. *Wilkins*, 6 Wheat. 135, 145; *United States* v. *Swift & Co.*, 270 U. S. 124, 141. In construction contracts, for example, if there is no provision for decision of disputed questions by the architect, or the engineer, or by arbitration, the issues of whether and to what extent a change increased the contractor's costs are jury questions. *Bates* v. *Carter Const. Co.*, 255 Pa. 200; *Hottinger* v. *Hoffman-Henon Co.*, 303 Pa. 283. In the common case where the contract provides for the valuation of extra work by the engineer or some other arbiter, his decisions are uniformly treated as determinations of fact and accorded the finality for which we here contend. 3 Williston, Contracts, §§ 800–802, p. 2251. And this Court has held that where one party refuses to submit a dispute under a clause requiring the determination of reasonable compensation for an invention to be made by arbiters, the issue of compensation is one of fact for the jury and not one of law for the court. *Humaston* v. *Telegraph Company*, 20 Wall. 20, 28; cf. 3 Williston, Contracts §§ 802, 803.[16]

A persuasive, even an *a fortiori*, analogy is furnished from the field of eminent domain. The

[16] Similarly, where the Court of Claims assumes independently to set an amount due to a contractor for increased costs incurred because of a change order, on the ground that the contracting officer has entirely failed to make any adjustment under Article 3 (*Karno-Smith Co.* v. *United States*, 84 C. Cls. 110, 124), the court's finding is clearly one of fact.

reasonable value of private property condemned for public use (which is ordinarily the equivalent of the just compensation demanded by the Fifth and Fourteenth Amendments) has always been held to be determinable by a non-judicial fact-finding tribunal. Indeed, it has frequently been argued and sometimes held that, in the absence of agreement, the finding must be made by a jury. *Vanhorne* v. *Dorrance*, 2 Dall. 304, 312–313 (C. C. Pa.); see Blair, *Federal Condemnation Proceedings and the Seventh Amendment* (1927) 41 Harv. L. Rev. 29. This Court has repeatedly held that the determination may constitutionally be made by such non-judicial arbiters as a referee, commissioners, appraisers, a board, a sheriff's jury, or the ordinary jury, as well as by a court. *Curtiss* v. *Georgetown and Alexandria Turnpike Company*, 6 Cranch 232; *Shoemaker* v. *United States*, 147 U. S. 282, 305–306; *Sweet* v. *Rechel*, 159 U. S. 380, 402–407; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557.[17] Many of the findings of such a body are, of course, findings of fact and have been explicitly characterized as such;[18] and in federal condemnation cases it is clear that, absent an express con-

[17] Condemnation statutes frequently provide for valuation by such tribunals. Cf, Blair, *supra*; *United States* v. *Hess*, 71 F. (2d) 78 (C. C. A. 8th); Orgel, *Valuation Under the Law of Eminent Domain*, § 7.

[18] *United States* v. *Jones*, 109 U. S. 513, 519; *Chappell* v. *United States*, 160 U. S. 499, 513; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 694–695.

trary directive in the statute, those findings of fact are accorded the usual finality.[19] *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 560; *Willis* v. *United States*, 99 F. (2d) 362, 365 (App. D. C.); *Johnson & Wimsatt* v. *Hazen*, 99 F. (2d) 384, 387 (App. D. C.); Orgel, *Valuation Under the Law of Eminent Domain*, § 128.

These principles are plainly decisive here. The contracting officer decided, over the contractor's objection, that it would not cost more than 14.43 cents per cubic yard to construct the enlarged berm. There can be no doubt that this disputed issue of the probable increase in cost is one of fact, for decision by a jury in a suit where trial by jury is had, and for the fact finding tribunal in other instances. Whatever be the merit of the Court of

[19] We do not suggest, of course, that all issues involved in valuation in eminent domain cases may be finally resolved by the nonjudicial fact-finding tribunal, even if the determination of the issues appears as findings or conclusions of fact. For in valuation the correctness of "findings of fact" may depend on the *legal issue* whether the tribunal made such findings on the basis of relevant or other legally permissible factors. And, for example, in cases where a landowner is seeking to predicate value on a future intended use of the property, the question whether he has met the legal test that such future use is not merely a speculative possibility but is reasonably probable is a question of law for the court. Such underlying legal bases for the findings of fact may vitiate the findings and is a legal issue, subject to full judicial review. Cf. Government brief on reargument, *United States ex rel. Tennessee Valley Authority* v. *Powelson*, No. 3, this Term. But, as we have shown (*supra*, pp. 23–25), there are no such legal questions involved in this case.

Claims' view that the contracting officer has no authority to decide "issues of law", it cannot further limit that officer's authority by defining the obvious issue of fact here involved as one of law. And since it is conceded that the contracting officer's reasonable determinations of fact are binding, and no attempt is made to show bad faith or arbitrary action, the respondent may recover nothing.

The decisions of this Court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 114, 115, 119, and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, 452, cited by the court below (R. 14, 18) as requiring its conclusion that a question of law was here involved, are wholly inapposite. They merely hold that the terms "fair and equitable" as used in Section 77B and Chapters X and XI of the Bankruptcy Act concerning plans of corporate reorganization are "words of art" which had acquired certain fixed meanings under prior decisions of this Court (308 U. S. at 115–119; 310 U. S. at 452), and that the question whether any plan of reorganization conforms to the statutory standard is for the court and not for the majority of the security holders. In reorganization cases there is no tribunal other than the court, established either by law or by contractual agreement, for the adjudication of the fairness or equity of a proposed plan. That function and that duty have been imposed by the Congress on the district courts. *Case* v. *Los Angeles Lumber Co., supra,* at

115. In referring to the issue before the district court as a "question of law" or a "legal question", this Court did not mean that under other statutes or agreements issues involved in a determination of "fairness" and "equity" could not be finally resolved by an appropriate non-judicial tribunal. Certainly this Court did not intimate that questions of measurement, calculation, and observation, issues of fact in the most universal sense, become matters of law when they are steps in a determination that a plan is fair or an adjustment equitable.[20]

C. *Even if the disputed issues are issues of law, a contracting officer's unappealed equitable adjustment under Article 3 is conclusive*

While we think it plain that here the only disputed issue was one of fact, we submit that even

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[20] *United States* v. *Smith*, 256 U. S. 11, also stressed below (R. 14–15) merely held (a) that a contractor could recover for extra work even though there had not been compliance with a contract provision requiring prior written agreement between the parties as to quantities and prices of extra work (256 U. S. at 13) because the engineer officer insisted that the additional work be done without a change agreement, and it was useless to solicit or expect any change by him, his conduct being "repellent of appeal or of any alternative but submission with its consequences" (256 U. S. at 16); and (b) that the engineer officer's decision that certain material was clay or boulders rather than limestone was so arbitrary that it could be disregarded (256 U. S. at 15–16). The officer had required the contractor to excavate for 18 cents a yard material similar to that for which $2.24 a yard had been paid him under a previous supplemental contract. The case obviously has no relevance here.

if called a determination of law, a contracting officer's equitable adjustment under Article 3 is binding, absent fraud or bad faith. Even were legal issues involved, the parties could validly agree to leave an equitable adjustment of the contract price, made necessary by changes in the contract, wholly to the contracting officer. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *Mason and Hangar Co.*, 260 U. S. 323; *English Const. Co., Inc.* v. *United States*, 43 F. Supp. 313, 314 (D. Del.). We submit that the parties have done so here.

The authority granted by Article 3 to the contracting officer to make equitable adjustment is not limited by the terms of that provision to issues of fact. It includes all disputes. The reference to Article 15 was intended, we believe, merely to apply the appeal procedure prescribed by the latter provision to the settlement of any disputed issues with respect to an adjustment under Article 3, and not to limit the contracting officer's authority, or that of the head of the department on appeal, to the settlement of issues of fact. In our view, the contracting officer was intended by the parties as the final arbiter of all disputes concern-

ing the proper equitable adjustment to be made under Article 3."[11]

This "normal and spontaneous" reading of the agreement (*Kirschbaum* v. *Walling*, October Term, 1941, No. 910, decided June 1, 1942) fully accords with the putative intention of the drafters of Article 3 to avoid the vexations and expensive litigation which would inevitably follow change orders if means were not provided for the contemporaneous settling of disputes by an arbiter. Cf. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553. The parties evidently envisaged that change orders would be frequent and, accordingly,

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[11] To read into Article 3 the same limitation upon the scope of disputes subject to adjustment as appears in Article 15, which is restricted to "disputes concerning questions of fact," would render superfluous the provision in Article 3 that "the dispute shall be determined as provided in Article 15 hereof," since factual disputes would in any case be subject to the latter Article. And that the scope of the disputes which may be adjusted under Article 3 is broader than the disputes referred to in Article 15 may further be gathered from Article 4 of the standard form of Government contract, providing for adjustments of cost and difference in time resulting from changes made by the contracting officer with the approval of the head of the department, by reason of subsurface or latent conditions at the site materially different from those shown in the drawings or specifications. Article 4 expressly requires that any increase or decrease of cost or difference in time resulting from such changes "shall be adjusted as provided in Article 3 of this contract."

disagreements as to the proper elements of the "equitable adjustment" would be many. Moreover, the questions involved in a determination of the adjustment to be made because of changed conditions, asserted to give rise to increased cost, are within the special competence of the contracting officer and the department heads, rather than of a court which has few established criteria and principles for making such adjustments. The procedure of conclusive administrative determination of all issues is therefore particularly appropriate.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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SEPTEMBER 1942.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~1004~~. 65

UNITED STATES, *Petitioner*,

v.

CALLAHAN WALKER CONSTRUCTION COMPANY.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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April, 1942.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1094.

UNITED STATES, *Petitioner*,

v.

CALLAHAN WALKER CONSTRUCTION COMPANY.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The question presented by the assignments of error is one of law and deals with the construction of the provision of Article 3 of the contract of August 27, 1931 which sets up a standard under which the amount of compensation for extra work, not covered by the contract, is to be determined before the contract is modified so as to include such extra work. (See Article 3 of the Contract, R. p. 64).

The specifications of the contract provided for the building of an earth fill levee to control the flood waters of the Mississippi River; and the change made in the specifications by the contract officer on October 18, 1932 was for the construction of an added riverside and landside false berm

between Stations 5123 and 5113 on the Lake Lee Setback Levee to support the natural foundation of the levee at those stations (R. p. 61 et seq.).

It is, of course, admitted by the petitioner that a change was made in the specifications of the contract when the construction work reached Station 5123 of Item A of the levee; and that such change was of a character which caused a substantial increase in the amount otherwise due under the contract at the unit price of 14.43c per cubic yard (R. pp. 6 & 7).

The contracting officer made the change in specifications because he thought that Paragraph 14 of the specifications gave him the power to do so (R. p. 29); but admits that he refused to make any adjustment with the contractor to cover its actual cost in performing the extra work covered by the change ordered as provided by Article 3 of the contract (R. pp. 27 & 64).

There is no dispute in the evidence that the *actual cost* of doing the extra work ordered by the contracting officer is the amount of $13,989.92 (R. p. 18) over and above the contract price of 14.43c per cubic yard under the standard fixed by Article 3 of the contract; but that in defiance of the standard fixed by Article 3 of the contract for arriving at an *equitable adjustment* to cover said amount by a modification of the contract, the contracting officer sought to incorporate the extra work in the main contract and apply the contract price of 14.43c per cubic yard for such extra work ordered (R. p. 6). This, as the Court of Claims holds, is a breach of Article 3 of the contract.

The contractor protested against such construction of the contract, and demanded that the contracting officer modify the contract in writing so as to make an equitable adjustment for the extra work at *actual cost*, plus 15% of such cost for supervision (R. p. 58), which it deemed to be equitable under the standard fixed for such extra work under Article 3 of the contract; and upon the absolute refusal of the contracting officer to observe such standard, the

contractor notified the contracting officer that it would stand upon its legal rights under the contract and would submit a statement of its *actual cost* of such extra work (R. p. 59). The contractor had no other alternative; and there is no dispute of fact over the amount of the extra cost incurred (R. p. 11).

The decision of the contracting officer that the unit contract price of 14.43c per cubic yard should be applied to the material placed in the added riverside false berm, irrespective of the probability that the placing of said material might cost the contractor more or less than that amount per cubic yard, was not an "equitable adjustment" of the actual cost of said extra work to the contractor; nor was it the determination of *a disputed question* of fact. The petitioner has never disputed the amount of the extra cost incurred by the contractor under said change order (R. p. 11).

At the time the change in specifications was thought necessary by the contracting officer there was no *fact question* in existence about which there could be a dispute with the contractor, and the contracting officer having ordered extra work performed without making any provision in his order to *modify the contract* or pay the extra cost that the contractor might incur, the right of the contractor to recover the amount of its actual extra cost incurred, as found by the Court of Claims, is clearly a question of law. (See *Henderson Bridge Company* v. *McGrath*, 134 U. S. 260, 33 L. Ed. 934). There is an implied promise on the part of petitioner, under the provisions of Article 3 of the contract, that the respondent be paid an *adequate* and *equitable* amount to cover the actual cost of extra work. (See Article 3, R. p. 64).

The contracting officer was not authorized under the contract to order extra work without making an equitable adjustment of the amount by which the contract price of 14.43c per cubic yard was increased or decreased, nor did he have the right to construe the contract as giving him authority

to impose his will upon the contractor; or to modify the provisions of the contract without the consent of the contractor in such a way as to make his decision *conclusive* as a matter of law.

The evidence submitted to the Court of Claims was for the purpose of showing that the contract had been modified without the consent of respondent and it had been damaged in a substantial amount by the breach of Article 3 of the contract by the contracting officer; and that the petitioner was attempting to hold and retain property and benefits obtained from the respondent without due process of law or the payment of just, equitable and reasonable compensation therefor. (See *Henderson Bridge Company* vs. *McGrath*, supra).

The petitioner seeks to defend the claim of respondent by attempting to show that the contracting officer's breach of the contract was based upon a "finding of fact by him" before the change was ordered that no extra cost would be incurred by the contractor in carrying out his order of October 18, 1932. The contract nowhere provides that the contracting officer may make such a decision, or that extra work shall be done at the contract price of 14.43c per cubic yard; but does specifically provide that where the cost of extra work increases or decreases the amount legally due under the contract at the unit price of 14.43c per cubic yard, that an "equitable adjustment" in the contract price of 14.43c per cubic yard *shall be made.*

An absolute refusal to make such adjustments, under the standard fixed by the contract, presents a question of law (see *United States* vs. *Smith*, 256 U. S. 11). Furthermore, the unit price of 14.43c per cubic yard is not the *standard of compensation or the cost of extra work*, and as a matter of law, the contracting officer erred in fixing such price as the standard for extra work. The petitioner is unable to show that respondent agreed to said price per cubic yard for the extra work, but admits that respondent did not so agree.

The position of the petitioner is that inasmuch as the contracting officer was required as a matter of law to make an adjustment in the contract price of 14.43c per cubic yard that would entitle the respondent to an amount for the extra work suffcient to compensate for the actual cost thereof; that his admitted failure to do so as Article 3 of the contract required does not present a question of law. (See *United States* v. *Smith*, 256 U. S. 11.) The argument of the petitioner is self destructive.

In order for the respondent to assert its legal rights under the contract it was required to show that it had been damaged by the illegal conduct of the petitioner; but the question with reference to the amount of said damage was a question of fact to be settled by the Court of Claims, under the question of law which the petitioner admits is presented by the construction which the contracting officer erroneously assumed he could properly make of the contract.

It is respectfully insisted that the Court of Claims has not departed from a well-settled principle of law governing contracts to which the United States is a party; and there does not appear to be any reason why the petition for writ of certiorari should be granted in this case.

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April, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 65.

THE UNITED STATES, *Petitioner*,

v.

CALLAHAN WALKER CONSTRUCTION COMPANY, *Respondent*.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

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On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

STATEMENT.

Before the contract involved herein was executed the petitioner had drawn up a set of "standard specifications of levee work" for flood control of the Mississippi River and tributaries (R. pp. 79 *et seq.*); and under such standard specifications bids were invited for the construction work to be done under an appropriation therefor. The petitioner also prepared drawings which accompanied such standard specifications; and it was upon the provisions of

such specifications and the drawings accompanying the same that the respondent submitted its bid, subsequently received a contract for the construction of the "Lake Lee Setback Levee" and acquired the kind of equipment suitable for the work as laid out (R. p. 61).

The standard specifications for levee work and the drawings in pursuance thereof are made a part of the contract of August 27, 1931 (R. p. 61); and on August 17, 1931, the contractor gave the contracting officer a description of the kind of equipment to be used (R. p. 5).

The Lake Lee Setback Levee is divided into four items designated 495L-A; 495L-B; 495L-C and 495L-D (R. p. 95); and it is with reference to Item 495L-A of the "Lake Lee Setback Levee" that this suit arises.

The specifications provide that,—

> Where, in any section *and before* the levee has been completed to grade and section, settlement of foundation develops to such extent as to make it inadvisable in the opinion of the contracting officer to continue to add material, and advisable in his opinion to postpone to a considerably later date all attempts to complete this portion of the levee to grade and section, he shall have the right to omit further work on this section, and to accept it as completed, after it has been dressed and sodded. (See paragraph 30.) (R. p. 91)

There is no dispute about there occurring a foundation settlement or failure on Item 495L-A between Stations or Sections 5113 and 5146 of such a pronounced character that the levee designed for such space would not stand up until buttressed by large riverside and landside false berms (R. p. 35); and that at the time said foundation settlement occurred construction work between Stations 5123 and 5113 was approximately 65 per cent to 75 per cent completed (R. p. 35).

Acting under the provisions of paragraph 28 of the specifications (R. pp. 90-91) the contracting officer deemed it inadvisable to continue to add material to the levee between Stations 5113 and 5146, because of the pronounced founda-

tion settlement; and on or about October 7, 1932, verbally ordered all work between Stations 5113 and 5123 stopped (R. p. 36).

The proof shows positively that the contracting officer decided on October 7th, that Stations 5113 and 5123 were within the area of foundation settlement of Item A; and that those Stations (as well as all Stations back to Station 5146 could not be completed under the contract (R. pp. 6-7).

On or about October 13, 1932, the contracting officer decided that riverside and landside false berms should be constructed between Stations 5113 and 5146 in order to complete the levee and began to let bids for the rental of equipment to build such false berms under the "force account" of the Government Engineers (R. pp. 6, 49).

On or about October 13, 1932, the contractor had substantially completed the contract of August 27, 1931, by a construction of the levee from Station 5113 to the end of Item A and was preparing to move off, but it was invited by the contracting officer to enter into negotiation with his office for a new contract, or a modification of the contract of August 27, 1931 (as provided by Articles 3 and 4 thereof) to build or permit the building of false berms between Stations 5113 and 5123 in order to complete the topping out of the levee at those Stations which were from 65 per cent to 75 per cent completed when foundation settlement occurred at Station 5123 and construction work stopped on October 7th (R. p. 49).

The contractor was willing to negotiate with the contracting officer for a modification of the contract of August 27, 1931, or a new contract to build or permit the building of added false berms between Stations 5113 and 5123 and top off the levee, provided it be paid a *fair* and *equitable* rental value for its equipment to be used in such construction so as to cover the *actual cost* of such work, plus 15 per cent for supervision (R. p. 58). The contractor knew from its experience, and the conditions prevailing at the place of work showed, that a *fair* and *equitable* standard

of the value of such particular work was not the over-all unit price of 14.43c per cubic yard, specified in the original contract (R. pp. 59-61); and it pointed out to the contracting officer why the original contract price of 14.43c was not a fair and equitable standard to cover the actual cost of work incident to building the added false berms (R. pp. 49-59). The contracting officer admittedly realized the contractor was correct, and proposed to and did build the landslide false berm between Stations 5113 and 5123 at actual cost to the Government under his "force account" (R. p. 49).

Negotiations for the construction of the added false berms between Stations 5113 and 5123 which the contracting officer opened up with the contractor and others (on or about October 13, 1932) for completion of the levee in Item A (after the stop order of October 7, 1932 (R. p. 49)) were carried on under the provisions of Paragraph 28 of the specifications (R. p. 91), and Articles 3 and 4 of the contract (R. p. 64).

The proposition submitted by the contracting officer to the contractor was not only in pursuance of a "change order" as provided in Paragraph 14 of the specifications, but took into consideration the provisions of Paragraph 28 of the specifications that the work of adding false berms, and the placing of additional material in the Levee proper, devolved upon the Government (R. pp. 6 and 7). The first suggestion of the contracting officer was that the Government (having taken the Levee over between Stations 5113 and 5146 (R. pp. 6 and 7)) would build the riverside and landside false berms between Stations 5113 and 5123 and the contractor should stand by with its "tower machine" to top out the Levee between those Stations (R. pp. 49, 54 and 91). The contractor could not afford to let its equipment remain idle (R. p. 54) while the false berms between Stations 5113 and 5123 were being constructed by the Government under its "force account" (R. pp. 49-54); and the alternative proposition submitted by the contracting officer

was that he let bids for the rental of equipment to build the landside false berm between Stations 5113 and 5123 and that the contractor undertake the work of building the riverside false berm and top out the Levee at the contract price of 14.43c per cubic yard (R. p. 49). The contractor notified the contracting officer that the riverside false berm could not be constructed at the price of 14.43c per cubic yard as the *standard of actual cost to it; that it had lost money at that price* under the original contract for the work done between Stations 5113 and 5123 (R. p. 59); and that the only way it could afford to build the riverside false berm between Stations 5113 and 5123 was *actual cost* of the work to it plus 15 per cent of such cost for supervision (R. p. 58). That the contract required such an *"equitable adjustment"* of the cost for the added work (R. pp. 49, 64-5). That the added work was outside the contract unless it was modified as provided by Articles 3 and 4 (R. pp. 64 and 65).

There was no *change* made in the *original Levee* designed under Paragraph 39.2 of the specifications for Stations 5113 and 5123, and covered by the contract of August 27, 1931 (R. pp. 48, 95); and the order of the contracting officer (issued verbally on October 14, 1932 through his Area Engineer, and later confirmed by letter of October 18, 1932) that false berms be added and the contractor build the riverside false berm "at contract price per cubic yard", was not alone based upon a *modification* of the *specifications* as provided by Paragraph 14 of the specifications (R. pp. 48-50); but was also based upon a *change* made in the contract as provided by Article 4 thereof, which required an *"equitable adjustment* of the cost" as provided by Article 3 (R. pp. 70-71).

The Area Engineer of petitioner testified as follows:

> Q. 25. Did the work of building the false berm *necessitate a redesign of the levee?*
>
> A. *It did not.* The same section of levee was used between those Stations as had been used elsewhere and was designed for that *particular section.* (R. p. 48) We did not desire to *change the contract at all, and made no attempt to.* (R. p. 50)

XQ. 197. What would you say with reference to the false berm, both landside and riverside being *additional construction* of that item? (R. p. 49)

A. Yes, sir, it reinforced the foundation of that item.

XQ. 198. It was additional construction, then, wasn't it?

A. *It was reinforcement of the foundation that wasn't in the original specification* (R. p. 50).

The contracting officer testified as follows:

Q. 11. You ordered the berm constructed by Callahan-Walker Company?

A. I did.

Q. 12. Pursuant to what *section of the contract did you give that order?*

A. Pursuant to Paragraph 14 of the specifications (R. p. 27).

* * * *

The contractor, asserting its legal rights under Paragraphs 3 and 4 of the contract, refused to make a new contract with the contracting officer to build the false berms between Stations 5113 and 5123 *at the price of 14.43c per cubic yard* because that price was not the proper standard of value for the work, and was not an "equitable adjustment" under Article 3 of the contract (R. pp. 44-58-59); but did agree to build the riverside false berm at *actual cost* as an "equitable adjustment" (R. p. 58). The Area Engineer arbitrarily gave the contractor verbal direction on October 14, 1932 to build the riverside false berm, with full knowledge that no price had been agreed upon as the standard of value for the work or as an "equitable adjustment" under Article 3 of the contract (R. p. 50); and the contracting officer advised the contractor to keep the accurate time on the various pieces of equipment used in the work so there *would be no dispute* as to the standard of value therefor, or the *actual cost* of doing the added work (R. pp. 47-48). There is no dispute over the quantity of material added in the false berm (R. p. 50), as to the rental value of the contractor's equipment, or as to the time such equipment was employed in the work (R. p. 11).

The contracting officer, in pursuance of the stop order of October 7th, subsequently put out bids for the rental of equipment to build a landside false berm between Stations 5113 and 5123 (R. p. 49); but undertook to construe the contract of August 27, 1931 as *conferring upon him authority to verbally* order the contractor to build the riverside berm at the "contract price per cubic yard" as the standard of value for such work (R. p. 50). The verbal order of October 14, 1932, with reference to a change in the specifications by the addition of false berms, was confirmed in writing on October 18, 1932 (R. pp. 6 and 7). At the time the verbal order was given the contractor to proceed with the construction of the "added riverside" false berm, it was handed a sketch of the dimension of same as a change of Section 39.2 of the specifications (R. pp. 44, 95), and when the letter of October 18th was issued the contractor had been working four days on the job with the knowledge and consent of the contracting officer (R. pp. 47-8). Also, with the implied understanding that the contractor would be paid the *actual cost* of such added construction, plus 10 per cent or 15 per cent of such cost for supervision (R. pp. 47-8).

Shortly after the work of building the riverside false berm between Stations 5113 and 5123 was completed, a statement of the cost thereof was submitted by the contractor (R. pp. 45-10-11); and the amount of such cost, over and above a credit of $6,622.65 paid at the unit rate of 14.43c *has not been paid* (R. p. 11). The facts which are made the basis of the *statement of cost* submitted by the contractor after the added work was completed, *are not now, and never have been in dispute* (R. p. 11).

On October 18th the contracting officer issued a written change order under the provisions of Paragraph 28 of the specifications and Article 4 of the contract as follows:

> In reference to recent subsidence which occurred on your Lake Lee Setback, Item A, this will confirm instructions issued to you by the Central Area Engineer

relative to the completion of your contract, as follows:
(a) A riverside false berm will be constructed from station 5113 to station 5123 having a riverside crown elevation of 120 ft. M. G. L. at a distance of 250 feet from centerline and sloping upward toward the levee on a 1 on 18 slope and downward to the ground surface on a slope of 1 on 6.

(b) *The above berm shall be completed before doing any further work between stations 5113 and 5123.*

(c) You will be given credit for 100% of the embankment south of station 5123.

(d) If and when directed by the contracting officer, the levee between stations 5123 and 5146 shall be sodded.

(e) Payment for additional yardage made necessary by the above instructions will be made at contract price per cubic yard. (R. pp. 6-7)

ARGUMENT.

The Court of Claims holds that the questions involved in this suit are purely questions of law; and deal only with the standard of value and the conduct of the contracting officer that Articles 3 and 4 of the contract prescribe, as a matter of law, for work not provided for in the specifications of the contract, but added by a change made in such specifications.

The standard of value for the construction of riverside and landside false berms between Stations 5113 and 5123 was not less than the *actual cost*, plus a reasonable percentage of such cost for supervision; and nothing short of such a payment for the work of building the false berms would be "fair and equitable" as a matter of law under the provisions of Articles 3 and 4 of the contract of August 27, 1931.

Article 4 of the contract provides that where any *change is made in the drawings and/or specifications*, the *cost* incident to such change shall be *adjusted* as provided in Article 3 of the contract (R. p. 65). The "added" false berms between Stations 5113 and 5123 were not required as additional yardage in the Levee "by reason of foundation set-

tlement" for which the standard of value is the contract price as provided by the first and second subsections of Section 28 of the specifications (R. pp. 50 and 90), but were required because of "latent conditions at the site materially different from those shown on the drawings or indicated in the specifications" (R. pp. 6 and 7 and 40-95).

The contractor could not be *refused payment* at 14.43c per cubic yard for any and all material placed in the Levee proper, it being substantially 65 per cent to 75 per cent complete on October 7, 1932, and the fact that such an amount has been paid under the contract for the material placed in the "added false berms" between Stations 5113 and 5123 (for which credit is given on the claim herein (R. p. 10)) is in no sense an "equitable adjustment" of the *actual cost* incident to the building of the *added riverside false berm* (R. p. 10).

The Court of Claims makes the following finding of fact with respect to the *actual cost* to the contractor, based upon the time required and rental value of the equipment used for the construction of the added riverside false berm, viz:

> This claim has not been paid in whole or in part.
>
> There is no dispute between the parties as to the time required by the subcontractor for doing the work described in Item A and Item D of this bill and the evidence shows that the price stated as the value of the use of the equipment and the work done by it as shown in these two items was reasonable and fair. The Monaghan dragline used was of more than usual capacity. (R. p. 11)

The additions made necessary by the change order increased the amount due under the contract by $500 or more (R. p. 10); and since there is no disputed question of fact over the amount due for the extra work as an "equitable adjustment" of the contract, which the parties agreed to as the standard of payment for such extra work in the event of a change in the specifications, the conduct of the contracting officer in refusing to make an "equitable adjustment" is

contrary to the standard prescribed by the contract (see Articles 3 and 4, R. pp. 64-65).

The powers of the contracting officer were defined by the contract (see Articles 3 and 4, R. pp. 64 and 65), and definition is limitation. Whether the contracting officer applied the contract standard validly set up; whether he acted within the authority conferred or goes beyond it; whether his conduct satisfied the pertinent demands of due process; and, whether he put his mind on the subject of an "equitable adjustment" to cover the "increase" or "decrease" (if any) in the cost of work made necessary by the change ordered, are purely questions of law and exclusively questions for judicial decision (see *Federal Radio Commission* v. *Nelson Brothers B. & M. Co.*, 289 U. S. 276-278 (78 L. Ed. 1173-4).

Therefore, inasmuch as there is no dispute of fact or contradictory evidence as to the time required to perform the extra work or the fair rental value of the equipment used in connection therewith as a basis of its actual cost, the point that full payment should be made for such extra work is ruled as a question of law (see *Upton* v. *Tribilcock*, 91 U. S. 203 (23 L. Ed. 203)). Furthermore, since the contracting officer failed to observe or follow the *standard of conduct* prescribed for him in the contract with reference to making an "equitable adjustment" to cover the cost of the extra work ordered (and "modify the contract in writing accordingly"), that point is also ruled as a matter of law (see *Chicago, Rock Island & Pacific Railway Company* v. *Cole*, 251 U. S. 54 (64 L. Ed. 113)).

The contract was modified by the verbal order of the contracting officer of October 14, 1932 that riverside and landside false berms be added to Sections 5113 and 5123, afterwards confirmed by the letter of October 18, 1932 (R. pp. 6 and 7); and inasmuch as there is not now, and never has been, any dispute of fact over the amount of the *actual cost* incident to the construction of the added riverside false berm under such "modification" (the landside false berm

between those Stations being built by the Government), the balance of the cost due for such work is legally payable under the contract. There is no *dispute over* the amount found by the Court of Claims to be *legally due* under the contract (R. p. 11).

The position of petitioner is that the contracting officer had a legal right to construe the contract, and hold as a matter of law that the added false berms between Stations 5113 and 5123 be constructed at the "original contract price". However, it concedes that there is no disputed fact question with reference to the actual cost of such extra work or the amount legally due the respondent under the terms of the contract, as construed by the Court of Claims (R. p. 11).

The petitioner also insists that the contracting officer fixed the contract unit price of 14.43c per cubic yard, as the standard of "payment for additional yardage made necessary under the change order" because he *thought* there was sufficient suitable material within the reach of the special equipment of the contractor, and for that reason he *concluded* as a matter of law that no "equitable adjustment" to cover the *added cost* of building a riverside false berm (much larger than the one originally specified at Stations 5116 and 5119) and at Stations 5113 to 5116 and 5119 to 5123 where no false berm had been provided for in the original specifications (R. pp. 6, 7, 27, 50 and 95) *was required under the contract*. Pitted against the conduct by the contracting officer in assuming that there may have been sufficient suitable material within the reach of the equipment of the contractor (by using as a part of such equipment the tractors and wagons of a third party), the proof shows that he failed completely to put his mind on the subject of whether the added false berms would cost more or less than the "contract price". The contract required, as a matter of law, a determination of the *actual cost* at which the added riverside false berm between Stations 5113 and 5123 could be constructed; and the Court of Claims holds that because the contracting officer merely expressed a "conclusion of law" at the close of his written "change order" that "payment

for additional yardage made necessary by the above instructions will be made at contract price per cubic yard", he breached Article 3 of the contract (R. pp. 12 and 17).

There is not one word of proof in the record that the contract price of 14.43c per cubic yard would be *fair, reasonable,* or *equitable* to cover "the increase in *cost*" made necessary by the added false berms at Stations 5113 and 5123 (see Article 4 of the contract, R. pp. 64 and 65); and on the other hand, there is positive and uncontradicted proof that the contract price of 14.43c per cubic yard did not cover the *actual cost* of 65 per cent or 75 per cent of the material already put into Stations 5113 and 5123 up to the time when the stop order was issued on October 7, 1932, and the subsequent "change order" promulgated October 18, 1932 (R. p. 59).

The position of the petitioner is that Articles 3 and 4 of the contract of August 27, 1931, properly construed, do not require an "equitable adjustment" increasing the "unit contract price" so as to make the amount which the contractor is entitled to receive for the added work "fair and reasonable"; or that such an amount be arrived at by the application of a proper standard which the contracting officer refused to adopt. That the contracting officer could breach Article 3 of the contract with immunity, no matter how imprudent his act or conduct may be; and that the only remedy of the contractor was the circuitous proceeding of appealing a "question of law" to the head of the department.

A majority of the Court below holds that there being no dispute of fact, the case turns upon a question of law. Judge Green and the Chief Justice are content to hold that the contracting officer breached Article 3 of the contract by his conduct and refusal to put his mind on the *subject* of *cost* of the "added construction" and fix an "equitable amount" to be paid therefor in view of a *modification* made in the specifications (see *Callahan Construction Company* v. *United States*, 91 Court of Claims 538, 611). They also say in the opinion that the term "equitable adjustment" as a

standard, when required under the contract and refused or ignored by the contracting officer, presents a question of law (see *Case* v. *Los Angeles Lumber Company*, 308 U. S. 106, and *Securities Commission* v. *U. S. Realty Company*, 310 U. S. 434).

Judge Whitaker, in his concurring opinion with the majority, takes issue with the minority opinion, that the refusal or failure of the contracting officer to make an "equitable adjustment" to cover the cost of added work presents a *disputed question of fact*. Judge Whitaker says:

> There is no dispute between the parties in this case as to the facts. The only dispute concerns whether or not the amount allowed by the contracting officer for the extra work constituted an equitable adjustment, and this, as the majority opinion holds, is a question of law. Neither the contracting officer nor the head of the department was given any right by the contract to decide such questions. If, therefore, the plaintiff did not think the adjustment made by the contracting officer was equitable, it had a right to appeal to this court for relief. The relief granted by the court is the relief to which I think the plaintiff is entitled.

Judge Whitaker is also of the opinion that the question of what constitutes an "equitable adjustment" as provided by Article 3 of the contract as a standard of value is "clearly a question of law" under the authority of *Case* v. *Los Angeles Lumber Company, supra.*

The minority of the Court below (Judges Madden and Jones) are of the opinion that even though the "dispute" is a question of law, the provision of Article 15 of the contract with respect to "all disputes concerning *questions of fact*" • • • being appealable to the head of the department,—prevents the Court from taking jurisdiction of the case. They say that the contractor should have appealed to the head of the department for a proper *construction of the contract*, and upon failure of relief there, commence its suit in the Court of Claims (R. p. 20).

The minority of the Court undertakes to construe the contract as giving the contracting officer the authority to pass upon questions of law, and so as to make the head of the department the *final judge* of all such questions of law. It is quite evident that the contract should not be so construed (see *Callahan Construction Company* v. *United States*, 91 Ct. Cls. 538).

The minority of the Court concedes that the contracting officer did not make an "equitable adjustment" to cover the *actual cost* of the added work as required by the contract, but says that because the subcontractor of the contractor had agreed with the contractor to put in some of the "original material" at Stations 5113 and 5123 at 16c per cubic yard (R. p. 59), that the contracting officer was near enough to being right when he specified the contract price of 14.43c per cubic yard as the standard for an "equitable adjustment". This is merely the decision of a question of law upon a different view from that expressed by the majority. The testimony of the "subcontractor" (whom the petitioner called as a witness) was that he *lost money* at 16c per cubic yard for the original material put in the levee between Stations 5113 and 5123; but such testimony is not preserved in the record here.

The terms "fair" and "equitable" are words of art no matter when or how used; and when not properly applied to a given situation, a question of law is presented. The case of *Case* v. *Los Angeles Lumber Company*, *supra*, is directly in point in this case.

Therefore, inasmuch as the contracting officer refused to pay a "fair" and "equitable" price for the added work demanded by him under the contract, he breached its terms (R. p. 12). The breach being admitted, the amount sued for is due the contractor under Article 3 of the contract as a matter of law. The contracting officer had no right to assume or conclude, as a matter of law, that the contract price of 14.43c per cubic yard was "equitable" and "fair" for added work ordered; and his apparent failure to put

his mind on the subject with respect to the added *cost*, his decision (if any) was not upon a disputed fact.

The Court of Claims makes findings of fact which show that the contracting officer misinterpreted his authority under the contract with respect to making an "equitable adjustment" for the cost of added work that was fair and reasonable; and holds that under the express terms of the contract the amount of such cost (less the amount credited thereon at the "contract price") is payable to the respondent as a matter of law.

The full Court below holds that the contractor fully complied with the "ten day" clause of Article 3 of the contract (R. p. 20), when it orally and personally protested to the contracting officer (while they were personally discussing the change made necessary by foundation settlement) that the "contract price per cubic yard" would not adequately cover the *increased cost* of placing the added material in a false berm; and that an "equitable adjustment" of such increased cost should be made and the contract modified accordingly in writing (R. p. 64).

It must be conceded that the actual increase in the cost made necessary by changes in the specifications could not be determined adequately and equitably until the added work was completed; and that the conclusion of the contracting officer that no bids for the work would be let, and only the "contract price per cubic yard" would be paid for the added work, is in no sense an "equitable adjustment" (R. pp. 49 and 50).

The change in specifications (Section 39.2, p. 95) was of such a nature that produced a modification of the contract; and since there is an express provision in Article 4 of the contract that *any increase in cost* incident to a change in the specification shall be paid under an equitable adjustment as provided for in Article 3, the refusal of the contracting officer to pay the actual cost of so much of the added work between Stations 5113 and 5123 which he *ordered the contractor to perform* was a breach of Article 3 of the contract (R. pp. 6 and 7).

The provisions of Article 3 of the contract that an "equitable adjustment" be made to cover the cost of added work was made *with contractual intent*, and the terms "equitable adjustment" are not purely illusory. The petitioner is bound in *good faith* to pay the contractor the *actual cost* of what it got and accepted; and there being no dispute over the amount of such cost not yet paid (R. p. 11) the petitioner is liable therefor as a matter of law. (See *Corthell* v. *Summit Thread Co.*, 132 Me. 94, 167 Atl. 79; *Henderson Bridge Co.* v. *McGrath*, 134 U. S. 260 (33 L. Ed. 934).)

The contract negatives the thought that "the contract price per cubic yard" shall be the standard of value for added work in that the cost of such added work might be less or more than such standard; nevertheless, when the contract makes no statement of the price to be paid for the added work (other than it shall be "equitable and fair"), and the contracting officer refuses to comply with the terms of the contract, the law invokes the standard of pay that is *equitable and just*. (See *United States* v. *Smith*, 256 U. S. 16; *Rust Engineering Co.*, 86 Ct. Cls. 461; *United States* v. *Spearin*, 248 U. S. 132; and *Kellog Bridge Co.* v. *Hamilton*, 110 U. S. 108.)

None of the voluminous cases cited by the petitioner are contrary to the sound principle of law announced by the Court of Claims in this case, and the case of *Case* v. *Los Angeles Lumber Company, supra*, is the only precedent needed to support such principle.

The position of the petitioner, when stripped of its verbiage, is that its solemn agreement (made with contractual intent) to pay an "equitable amount" for extra work added to a contract may be ignored as a matter of law; and the injured party has no standing in Court. That although the petitioner has received, accepted and retains a substantial benefit for work and labor done; the party whom it contracted with and "ordered" to do the work, supply the equipment and supervise the construction should not be paid because he has not yet met his obligation to a third

party for the *fair rental* value of some of the equipment used (R. p. 17).

Such an argument merely magnifies the legal misconduct of the contracting officer in refusing to make an "equitable adjustment" and since the Court of Claims has adequately disposed of the point of law underlying such position, the matter does not need further discussion (R. p. 17).

Respectfully,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 65.

THE UNITED STATES, *Petitioner*,

v.

CALLAHAN WALKER CONSTRUCTION COMPANY, *Respondent*.

On Writ of Certiorari to the Court of Claims.

APPLICATION FOR REHEARING.

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APPLICATION FOR REHEARING.

Respondent respectfully requests that this case be reconsidered and remanded to the Court of Claims for additional findings of fact on the principle of *Helvering v. Rankin*, 295 U. S. 123. *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1.

The judgment of the Court of Claims is based upon its findings that the cost of the added work was substantially double the contract price of 14.43¢ per cubic yard, and that the contracting officer made no adjustment to cover such added cost. The Court of Claims also makes the specific

finding that there was not "sufficient suitable material for levee construction within the right-of-way assigned the contractor" to supply the additional yardage required at the sector under the change of design in the levee (R. p. 8), and that the tower machine used by the contractor would not reach the place at which suitable material could be found. (R. p. 8). These facts existed at the time of the change order of October 18, 1932, and had the contracting officer exercised the diligence required of him he could not have escaped knowledge of same. These facts were overlooked by the contracting officer when he considered the matter of changing the design of the levee.

As the case now stands the contractor is penalized although acting in good faith under the findings of fact by the Court of Claims, while the Government is given a premium because the contracting officer says he "failed to see a condition" that was clearly obvious to *any person* acting in good faith; and with an honest purpose under the circumstances. See *United States* v. *Smith*, 256 U. S. 11. The Court of Claims also finds that—"suitable material *did not exist* in depth to more than two or three feet in the borrow pit area, and the territory possible of excavation for levee material, *under the revised plan*, was extended beyond the limits contemplated by the contract" (R. p. 8). That under the original plan of the levee there was not sufficient suitable material directly in front of the new levee (R. p. 8). Such facts could not have escaped the attention of the contracting officer, and his failure to give them due consideration *in estimating* cost of added work is certainly not an act of good faith (see *United States* v. *Smith, supra*). The contracting officer could not honestly say there was sufficient suitable material available within reach of the contractor's equipment when as a matter of fact there was not (R. p. 8).

There is a positive finding by the Court of Claims (R. p. 8) that the contracting officer failed to ascertain the probable cost of the new "levee on berm", when it finds that

the material suitable for such construction *did not exist* within the reach of the equipment employed by the contractor up to the time of the change (R. p. 8); and in order to reach the material needed hauling equipment had to be employed (R. p. 8) or the needed material handled by relays of excavation equipment (R. p. 8).

The cost of building a "levee on berms" such as the new design called for at Stations 5113 and 5123 merely involved digging, moving and placing earth, it is true, but the added cost comes about by an increase in distance of movement of needed material. Equipment different from that used by the contractor must be employed which the contractor did not have; and the person who had such equipment available would not consent to its use by the contracting officer or the contractor without a promise to pay a reasonable rental price therefor. (See *United States* v. *Atlantic Dredging Co., supra*) The contracting officer knew that the contractor did not have suitable equipment, and that the increased distance of moving the earth would substantially increase the cost of the added work over the contract price. Such undisputed facts bear materially on the question of the good faith conduct of the contracting officer; and the fact that he may have considered them, but gave no weight to the importance of such facts as a basis of his decision (and the Court of Claims says he did not) is positive evidence that he did not act with an honest purpose and in good faith. (See *United States* v. *Smith, United States* v. *Atlantic Dredging Co., supra*).

The contractor was desirous that it be paid no more or no less than the *actual cost* of the added work; and was in no position to appeal from the order of October 18, 1932, before the work was done. Furthermore the contractor was given reasonable assurance by the contracting officer that if the added work cost more than 14.43¢ per cubic yard, payment of its actual cost would be made when the work was completed. (See *United States* v. *Atlantic Dredging Co., supra*)

The application for a rehearing is presented because counsel for respondent relied primarily upon the case of *United States* v. *Smith, supra,* as a basis for the suit, and urged the Court of Claims to make a finding on the evidence that the conduct of the contracting officer was arbitrary and capricious as regards added cost of the work (R. p. 16). The finding by this Court to the effect that the contracting officer acted in good faith and with an honest purpose as regards the added cost of the work is in conflict with *Helvering* v. *Rankin,* 295 U. S. 123 (79 L. Ed. 1343); and denies to the Court of Claims the right to make a finding on that phase of the case.

In the case of *Helvering* v. *Rankin, supra,* the Court says:

> "If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board * * * *and the same procedure is appropriate when the findings omitted by the Board might be supplied from examination of the record.*"

The consideration which the contracting officer gave to the necessities of making a change in the design of the levee at the sector covered by Stations 5113 to 5123 between the dates of October 7th and 14th did not contemplate an order that the contractor do any part of the new work, but that it would stand by with its equipment to top out the levee when the new work had been completed under the "force account of the Government". When the contractor protested against such an arrangement the contracting officer *arbitrarily* ordered the contractor to do a part of the new work at *the contract price.*

The finding made by the Court of Claims that the newly designed levee substantially increased the cost of the work over and above the contract price shows that the contracting officer *acted arbitrarily* when he refused to commit himself irrevocably to pay the actual cost thereof. The new work required at Stations 5113 to 5123 was wholly out-

side the terms of the contract; exceeded the pro rata allowable increase at that sector of Item A under the provisions of Section 12 of the specifications, and under such circumstances the order of October 18th should be *construed* as a mere request on the part of the contracting officer that the contractor place the added material at *actual cost*. The contracting officer says that he had "*actual cost*" in mind when he specified the contract price, and the contractor says it so understood the purpose of the order.

Therefore, since the Court of Claims has found the *actual cost* of the added work—which is not disputed by the Government—the law implies a liability of the Government to pay an amount (actual cost) which the contracting officer intended. If the contracting officer intended that the contractor do the added work at less than *actual cost*, the basic purpose of his order of October 18th was not endowed with the virtue of honesty; and is clear evidence of an act of bad faith. (See *United States* v. *Atlantic Dredging Co.*, *supra*)

Respectfully,

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SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1942.

The United States, Petitioner, *vs.* Callahan Walker Construction Company. } On Writ of Certiorari to the Court of Claims.

[November 9, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This case involves the meaning and application of the terms of a standard form of Government construction contract.

The findings of the Court of Claims may be summarized. In 1931 the War Department asked bids for the construction of a levee on the east side of the Mississippi River. The respondent bid 14.43¢ a cubic yard on a section of the work involving approximately 3,881,600 cubic yards of earthwork. A paragraph of the specifications reserved the right to make such changes in the work contemplated as might be necessary or expedient to carry out the intent of the contract or to meet unanticipated conditions, but added that no such modification would be the basis for a claim for extra compensation except as provided in the regular form of contract to be entered into between the parties.

The respondent began construction at the south end of the project and proceeded northward. The length of the proposed levee was divided by stations one hundred feet apart and numbered from north to south. Sixty-eight per cent. of the construction between Station 5123 and Station 5113 had been completed when portions of the levee already constructed south of Station 5123 were found to have a tendency to subside. For this reason the Government contracting officer, on October 7, 1932, ordered the work stopped between the two stations while he sought to determine the cause of the subsidence. He concluded that the placing of an enlarged false berm, not called for in the original specifications, would prevent subsidence in the sector between the two stations. On October 18th he gave respondent a written order to construct such a berm; the order stated that respondent would be given one hundred per cent. credit for the earth placed

south of Station 5123 where the subsidence had occurred and that payment for additional yardage required by the false berm would be made at the contract price per cubic yard. The additional yardage involved was about 64,000 cubic yards. The work covered by the change order was necessary for the completion of the project. The order was issued against the respondent's protest that an extra price should be allowed as the additional work would cost the respondent more than 14.43¢ per cubic yard, and that the order was not within the terms of the contract. The respondent asserted it would later present a claim for extra cost occasioned it by the additional work.

Article 3 of the standard form of construction contract signed by the parties provides:

"Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. . . . Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

Article 15 provides:

"Article 15. *Disputes.* Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed."

The respondent did not appeal from the order of the contracting officer to the head of the department concerned. After completion of the work, the acceptance of the Government's final payment was under protest. Thereafter respondent brought this action for its additional costs over the price of 14.43¢ paid it for the extra work and was awarded a recovery by the court below.

The Government's defense was that, under the terms of the

contract, the contracting officer's decision as to what was an equitable adjustment involved only a question of fact and that if the respondent was dissatisfied with the officer's judgment the contract limited further recourse to an appeal to the department head. The court below overruled the contention by a vote of 3 to 2, one of the judges in the majority writing a separate opinion.[1] Two of the judges were of opinion that the contracting officer paid no attention to Art. 3 of the contract, made no adjustment, and, without considering the possibility of extra costs involved in the extra work, simply ruled that the contract price applied to it.

We cannot accept this view for several reasons. In the first place, there are no findings to support it. The findings show that the officer gave the matter consideration, reached a decision about it, and issued the order which gave respondent a credit to which it might not have been entitled under the contract, and fixed the rate of 14.43¢ per cubic yard for the extra yardage required by the change in the specifications. There are no findings that the contracting officer failed to ascertain the probable cost of the new work or that he did not honestly decide that the contract price would be a fair allowance for the extra work. If the conflict between the opinion and the findings were sufficient to require a remand for clarification this is obviated in the present instance by certification of the evidence which supports the following conclusions. Between October 7th, the date of the stop order, and October 18th, the date of the change order, the respondent's officials were in touch with the area engineer and the contracting officer, represented that there was not sufficient earth in the borrow pit opposite the sector in question but that the earth would have to be brought from other points, and that the contract price of 14.43¢ would be insufficient to compensate for the additional expense involved. The Government's representatives disagreed with the contentions. Prior to October 18th, however, after talking with the contracting officer, respondent's officials signified that they would proceed with the work as ordered, keep a careful record of the work done and its cost, and would later insist on payment of any cost greater than that specified by the change order.

All three judges who were in the majority below agreed, as an alternative ground of decision, that if what the contracting officer did constituted his notion of an equitable adjustment, he was wrong; and the respondent was right in its claim that the adjust-

[1] — C. Cls. —; F. Supp. —.

ment made was unfair and inequitable. To the Government's insistence that the question was one of fact and, therefore, to be settled finally by appeal to the department head, in accordance with Art. 15 of the contract, the court below replied that this court, in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, held that what constitutes an equitable adjustment is not a question of fact but a question of law. In this view they held that Art. 15 was inapplicable; that the contracting officer having erred in his construction of the contract had thereby breached its terms, and the respondents were entitled to sue for the amount of damage incurred by that breach.

The decisions cited are not authority for the principle that what is fair and equitable is always a question of law. Quite the contrary. In § 77B of the Bankruptcy Act it was provided that the court should confirm a plan of reorganization if satisfied "it is fair and equitable" and does not discriminate unfairly in favor of any class of creditors or stockholders. We held that, in this connection, the phrase "fair and equitable" had become a term of art, that Congress used it in the sense in which it had been used by the courts in reorganization cases, and that whether a plan met the test of fairness and equity long established by judicial decision was not a question to be answered by the creditors and stockholders but by the court as a matter of law.

An "equitable adjustment" of the respondent's additional payment for extra work involved merely the ascertainment of the cost of digging, moving, and placing earth, and the addition to that cost of a reasonable and customary allowance for profit. These were inquiries of fact. If the contracting officer erroneously answered them, Article 15 of the contract provided the only avenue for relief.

The judgment is reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S